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No. 03-986

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL R. BLOOMBERG, Mayor of the City of New York, MARVA HAMMONS, Administrator of the New York City Human Resources Administration and Commissioner of the New York City Department of Social Services, and MARY E. GLASS, Commissioner of the New York State Department of Social Services,

Petitioners,

-against-

HENRIETTA D., NADIA S., SIMONE A., EZZARD S., JOHN R., and PEDRO R., on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an Americans with Disabilities Act Title II claim challenging the operation of a large welfare program, directed solely to the provision of enhanced benefits to a class of disabled persons, on the ground that the entire program is merely a "reasonable accommodation" mandated by the Americans with Disabilities Act, do the Americans with Disabilities Act and the Rehabilitation Act require evidence and a finding by the court that the disabled were treated differently from the able-bodied or that they were disparately impacted in order to support a finding of systematic discrimination?

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The Order of the United States Court of Appeals for the Second Circuit to which this petition is directed, is published at 331 F.3d 261 (2d Cir. 2003) and is printed in the Appendix (A1-A64). The Opinion and Order of the United States District Court for the Eastern District of New York, which found the City and State defendants violated the Americans with Disabilities Act of 1990 (42 U.S.C.§§ 12131-213) and section 504 of the Rehabilitation Act of 1973 (29 U.S.C.§ 794); various provisions of the Medicaid Act (42 U.S.C. § 1396(a)(8), (19); and various provisions of the New York State Constitution and New York State Social Services Law is published at 2001 U.S. Dist. LEXIS 21834 and printed in the Appendix (A65-A80). The Order of the United States District Court for the Eastern District of New York, which found the City and State defendants violated all the above-stated Constitutional provisions and federal and state statutes and set forth the District Court's Findings of Fact and Conclusion of Law, is published at 119 F. Supp. 2d 181 (E.D.N.Y. 2000) and is printed in the Appendix (A81-A171). The Order of the United States Court of Appeals for the Second Circuit, dated October 2, 2003, which denied appellants' petition for rehearing en banc, is not published and is printed in the Appendix (A172-A173).

JURISDICTION

The Supreme Court has jurisdiction to review the Order of the Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1).

FACTUAL BACKGROUND

At the commencement of this litigation in 1995, plaintiff class, certified in 1996 and consisting of all persons in the City of New York with clinical symptomatic HIV illness or with AIDS, received case management services from the Division of Aids Services ("DAS") and income support services, i.e., eligibility determinations, from Income Support/AIDS Services ("IS/AS"). These New York City programs are unique in New York State and in the United States, offering to this group of disabled individuals very significant additional welfare benefits and access as compared to what is offered to the able-bodied welfare recipients and otherwise disabled recipients. Between 1995 and 1997, DAS underwent restructuring which resulted in the consolidation of these programs into the Division of AIDS Services and Income Support ("DASIS") (2088).[1]

In 1997, the New York City Council enacted Local Law 49, which formally established the Division of AIDS Services and mandated the provision of certain benefits and services (2088). Local Law 49, also known as the DASIS Law, is codified at § 21-126 *et seq*. of the New York City Administrative Code.

DASIS provides Case-by-Case Financial Assessment (CBCFA) to address specific compelling financial needs not met by client's budgeted public assistance allowances. Such needs arise when clients move and must pay a security deposit, broker's fees and/or moving expenses, when clients' rents are above the enhanced rent level available to persons with AIDS or HIV under state regulations, when a client has rent or utility arrears, when new household furnishings or clothing must be purchased and other special circumstances. CBCFA grants are available solely to DASIS clients (1795) and there are no time constraints imposed by law on the processing of CBCFA applications, although the DASIS Policy and Procedures Manual recommends a timeframe of 20 business days. CBCFA is not a modification of the City's public assistance program. Rather, it is a separate program designed expressly for persons disabled by AIDS and HIV-related disease. In the second quarter of FY 99, 81% of clients' CBCFA requests were granted and the average number of days for processing CBCFA requests was 2.28. In the third quarter of FY 99, 82% of clients' CBCFA requests were granted within three working days and the average number of days for processing CBCFA requests was 1.69. In the second quarter of FY 00, 84.1% of clients' CBCFA requests were granted within three working days and the average number of days for processing requests was 9.9 (2046).

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[1] Numbers in parentheses preceded by "A" refer to pages of the Appendix. Numbers in parentheses not precede by "A" refer to pages of the Joint Appendix in the Second Circuit.

BENEFITS PROVIDED DASIS CLIENTS

DASIS provides expedited application procedures for public assistance, Medicaid, and Social Security benefits (1792; 1799). In addition to providing the same public assistance benefits to financially eligible DASIS clients that are available to financially eligible able-bodied clients through the City's other public assistance programs, DASIS also provides case management and other services and benefits that are available solely to persons disabled by AIDS or HIV. DASIS clients include several thousand who, due to their income, are not eligible for public assistance benefits, yet receive case management and other services through DASIS. Clients who are not financially eligible for public assistance, but receive case management services from DASIS, are referred to as "services cases" (1788).

Benefits and services available to DASIS clients include: "the intake and assessment process, access to public assistance, Medicaid, food stamp, home care, homemaker, housing services, emergency transitional and permanent housing services, advocacy, referrals to counseling, and emergency financial services" (1789). Once a person becomes medically eligible for DASIS, that person may remain a DASIS client as long as he or she wishes to receive services from DASIS (1787). In contrast to HRA's other programs, there are no financial requirements or limitations to becoming a DASIS client (1787-1788).

Public assistance DASIS clients must recertify twice a year for financial eligibility (1869). State law mandates that DASIS close a public assistance case within ten days with adequate notice if a client fails to recertify. DASIS sends its clients notices for recertification (1907). E.g., Ex.62, Ex.66 (2116; 2120). Clients are also informed of recertification dates one month in advance on their receipts when they access and sign for their benefits (1907; 1909-1910; 2104). At the time of trial, DASIS provided benefits and services in all five boroughs of New York City through nine field operation centers. A tenth center was scheduled to open in July 2000 (1786). There are approximately 27,000 DASIS cases and of those 27,000, between 16,000 and 17,000 are public assistance cases. The balance of cases are services cases (1783). Only about 6% of DASIS' clients currently require home care services (1797). None of the four intervenors require home care services (1278; 1388; 1473; 1524).

One of the financial benefits available to DASIS public assistance clients that is not available to other public assistance recipients is "enhanced rental assistance." Under state regulations, the maximum rent allowance available to a single New York City public assistance recipient who does not have AIDS or HIV-related illness, is $215/month.

18 N.Y.C.R.R. 352.3(a). By contrast, under state regulations the maximum rent allowance for a single New York City public assistance recipient with AIDS or HIV-related illness is $480/month. 18 N.Y.C.R.R. 352.3(k) and 18 N.Y.C.R.R. 397.11. For single DASIS public assistance clients whose housing costs exceed $480/month, DASIS will conduct a case by case financial assessment -- CBCFA -- and provide additional financial assistance to meet a reasonable additional rental assistance need. All rental assistance above $480 is considered an exception to policy (1793; 1905). Only clients of DASIS are eligible to receive rental assistance above $480 (1795). Case by case financial assessments ("CBCFA"), or exceptions to policy, are reviewed by the central administration in DASIS for control purposes (1893-1894). Only DASIS clients are eligible for CBCFA exceptions to policy as this is a separate program created for persons with AIDS and HIV related illness (1795). In 1999, DASIS spent approximately $35 million on enhanced financial benefits provided under the CBCFA process (1805).

Another enhanced financial benefit provided by DASIS to its public assistance clients is the Nutrition and Transportation supplement (1795). Like CBCFA, the Nutrition and Transportation supplement is an allowance available only to DASIS clients (1898-1899). In 1999, the city of New York expended about $50 million in nutrition and transportation grants to DASIS clients (1797).

Under State regulations, the maximum amount a single person eligible for public assistance may receive, exclusive of shelter allowance, fuel for heating allowance, and other specified emergency allowance (i.e., the "food and other grant") is $112/month. In addition, under State regulations, a single person eligible for public assistance is budgeted $24.10 as a home energy assistance allowance. Thus, the maximum public assistance grant, exclusive of shelter allowance and any emergency grants which a single public assistance recipient in New York can receive is approximately $137. 18 N.Y.C.R.R. 352.2.

With the enhancement of the Nutrition and Transportation supplement, a single DASIS public assistance client receives $330/month or $165 semi-monthly, exclusive of shelter allowance and any emergency grants (1900). This amount is arrived at by adding the State standard of $112/month for "food and other" to the $24.10 State standard for "energy assistance" and the City's Nutrition and Transportation supplement provided solely to DASIS public assistance clients which is $193 for a single person (1898).

Unlike non-DASIS public assistance recipients, there are no work requirements for DASIS public assistance clients (1785). DASIS offers a work opportunity and transitional benefit to its clients. This benefit permits interested DASIS public assistance clients to explore returning to work without jeopardizing their public assistance benefits (1961-1962).

DASIS provides its staff with a policy and procedures manual relating to benefits and services, including case management services. Policies are modified and updated and these changes are disseminated to the staff (1981). The staff of DASIS is trained in several ways. Supervisory skills meetings are held monthly with case management staff. In addition, the staff is trained on policies and modified procedures. Information about community organizations is also provided to staff at supervisory skills meetings (1983). Consultants are used to "write the curriculum and deliver the training" (1983). Staff also receives training at the Training Academy which was established in August 1999 at Fordham University, Graduate School of Social Services. New case management staff receives twenty days of training at the

Training Academy. Approximately 650-700 staff have completed training at the Academy (1983).

FAIR HEARING PROCEDURES

A Fair Hearing is a means for a client to challenge a decision made by DASIS regarding that client's public assistance case. An Administrative Law Judge for the State of New York reviews the challenged decision (1882). Fair Hearing decisions rendered since the establishment of DASIS until 1998 were processed by the Liaison and Adjustment Unit of the Family Independence Administration (1883, 1925). Fair Hearing decisions frequently contain language that permit the agency to "review its previous action with respect to the Appellant's [Public Assistance and/or Food Stamps and/or Medicaid] benefits" and to "recompute the Appellant's Public Assistance benefits."

TRIAL TESTIMONY

Out of approximately 27,000 DASIS clients, plaintiffs presented the testimony of three former and one current DASIS public assistance clients, all of whom had received the public assistance benefits to which they were entitled. Only one intervenor, Henry Bradley, was a current recipient of public assistance through DASIS. The testimony of the four intervenors demonstrated that they are highly functioning, are not homebound and are not in need of homecare services. Two of the four do not take medication for their HIV condition. None testified, moreover, that they would suffer imminent harm absent injunctive relief.

For purposes of plaintiffs' direct testimony, we respectfully refer the Court to the District Court's findings of fact, which essentially accepted all of their testimony as true. (A90-A111) .

Cynthia Knox and Catherine Bowman, lawyers and advocates for people with HIV and AIDS, testified for plaintiffs (1604; 1654). Neither Ms. Knox nor Ms. Bowman testified based on their personal knowledge of problems experienced by DASIS clients in obtaining benefits from DASIS (1643; 1672; 1699a). Neither Ms. Knox nor Ms. Bowman could identify any clients who had any problems with DASIS. In fact, the Court asked Ms. Knox if she could think of one client who had a problem with DASIS, and she testified that not one came to mind (A-1645). Nor could Ms. Bowman identify a single client who had had a problem with DASIS (1699a). Catherine Bowman admitted that she was personally aware of only two cases in which her office had complained to DASIS about non-compliance with State Fair Hearing decisions. Ms. Bowman admitted that compliance with both these decisions was achieved (1699).

Dr. Ernest Drucker, an epidemiologist, examined 31 applications for CBCFA for rent in excess of the $480 authorized under State regulations (1699j-1729). He concluded that DASIS failed to process 24 applications within its own self-imposed timeframe of 20 business days or 30 calendar days. Dr. Drucker also testified concerning Plaintiffs' Exhibits 202 and 203 which purport to show that of 2500 applications for CBCFA received by DASIS between October 1 and December 31, 1999, DASIS did not meet its own 30-day timeframe in 32.9% of the applications (1716-1718). Based on Dr. Drucker's testimony and data relating to CBCFA in the DASIS Quarterly Performance Reports (A150), the District Court found systemic problems in the administration of benefits resulting in violation of the ADA and Rehabilitation Act.

As noted, CBCFA is a benefit available only to DASIS clients. It is not an accommodation for the disabled, but a separate program available solely to people disabled by AIDS or HIV-related disease. Consequently, any failure by DASIS to meet its self-imposed timeframes for processing CBCFA applications cannot be the basis for a finding of liability under the ADA and Rehabilitation Acts.

PROCEEDINGS BELOW

The District Court accepted as fact the entire anecdotal testimony of the four interveners. The Court refused to permit critical testimony of the Executive Deputy Commissioner of the Family Independence Administration of the City Human Resources Administration, Patricia Smith, who was prepared to testify that plaintiffs' class received equal provision of services as compared with non-DASIS public assistance clients and that those services were in some areas equal to and in some areas superior to those provided to non-DASIS public assistance clients. The Court held that defendants violated plaintiffs' rights under the Rehabilitation Act, § 504, and the Americans with Disabilities Act, Title II, by discriminating against DASIS clients by not providing a reasonable accommodation to permit them to obtain the same benefits and services as non-disabled persons. The Court required the DASIS program to provide 100% compliance with the statutes and its own policy and procedures manual, leaving no room for human error or bureaucratic inefficiencies (A70).

The Court of Appeals affirmed the decision of the District Court in its entirety, with a minor exception not relevant here, "[b]ecause we conclude that the alleged general failure of New York City's public benefits system in this case does not excuse the city defendants from their duty under the ADA and the Rehabilitation Act to ensure that the plaintiff class members have meaningful access to benefits to which they are facially entitled... ." (A5). The Court summarized its question for review as "whether a Title II plaintiff, to succeed on a claim alleging failure reasonably to accommodate, must also establish an adverse disparate impact on persons with the plaintiff's kind of disabilities" (A23).

The Court identified the threshold question as whether a Title II plaintiff who proceeds under a reasonable accommodation theory must establish disparate impact, that is, whether plaintiff must demonstrate that a comparison class is given preferential treatment (A24). Following fellow circuits and "suggestions" in this Court's plurality opinion in *Olmstead v. L.C.*, 527 U.S. 581, 598, the Court of Appeals concluded that it does not. In reaching its conclusion that no disparate impact need be shown, the Court relied upon the Justice Department's regulations, "as we understand them" (A25). The regulations state that a public entity may not, *inter alia*, afford a qualified disabled individual an opportunity to participate in or benefit from aid, benefits or services *that is not equal to that afforded to others.* [emphasis added]. The Court interpreted this regulation to mean that the public entity cannot prevent a qualified individual from enjoying the benefits "regardless of whether other individuals are granted access" (A27). In support of its interpretation, the Court cited two of its own precedents, *Dopico v. Goldschmidt* ,687 F.2d 286 (2d Cir. 1982), and *Rothschild v. Grottenthaler,* 907 F.2d 286 (2d Cir. 1990), as well as several from other circuits, including *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996), and *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162 (1st Cir. 2002) (A27-A30). All of these cases involved an implied disparate treatment or impact. The issue of disparate treatment or impact was never contested by the defendants in any of these cases. For example, in *Rothschild*, the issue was whether a public school had to accommodate deaf parents by providing a sign language interpreter at parent-teacher conferences. The fact that the disabled parents were disparately impacted as compared to hearing parents was never at issue. Rather, it was conceded because it was implied from the facts and common experience.

The Court of Appeals also relied on this Court's decision in *Olmstead v. L.C., supra,* 527 U.S. 581, for the proposition that an ADA claim need not include proof of disparate impact. Specifically, the Court quoted Justice Ginsburg's statement that "[w]e are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA" (A30). This statement does not support the proposition that no disparate treatment or impact need be demonstrated, but rather that disparate treatment may be demonstrated by comparisons of persons within the same class. While acknowledging that the basic analytical framework of the ADA has a comparative component, the Court of Appeals stated that it does not follow that a plaintiff must demonstrate disparate impact by reason of discrimination in all cases, but merely a denial of benefits (A31-A32).

The Court separately addressed the issue of whether defendants should be permitted to demonstrate that the failure in some cases of plaintiffs to receive benefits was not because of disabilities, but because of failure in the system affecting disabled and able-bodied equally. The Court held that the statute defines benefits "by reference to a plaintiff's facial legal entitlements" (A33). It opined that evidence that able-bodied were not receiving benefits in a quantity equal to the disabled would at best be an affirmative defense (A34). Regarding the question of causation, the plaintiffs claimed that their abilities are sharply limited and that the DASIS accommodative regime fails to remedy these problems. The defendants contend "that their own bureaucracy is so defective that even healthy applicants cannot 'negotiate' it, such that there is no disparate impact on the plaintiffs" (A35). Employing traditional concepts of causation drawn from the common law of torts, the Court held "that the District Court did not clearly err in concluding, in effect, that the plaintiffs' disabilities were a substantial cause of their inability to obtain services..." (A37).

REASONS FOR GRANTING THE PETITION

I. BECAUSE DISCRIMINATION IS AN ESSENTIAL ELEMENT OF ANY CLAIM UNDER THE ADA OR THE REHABILITATION ACT, PLAINTIFFS' FAILURE TO ALLEGE OR PROVE AND THE COURTS TO FIND ANY DISCRIMINATION BY THE CITY AGAINST THEM AS COMPARED WITH THE ABLE-BODIED IS FATAL TO THEIR CAUSE OF ACTION.

Title II of the ADA provides that a qualified individual with a disability may not be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity because of the individuals' disability. 42 U.S.C. § 12132. A public entity may have to make "reasonable modifications to rules, policies or practices" or provide "auxiliary aids or services" to enable an ADA-disabled individual to participate in its program. 42 U.S.C. §12131(2).

In *Alexander v. Choate,* 469 U.S. 287 (1985), this Court considered a claim by disabled persons receiving Medicaid benefits who challenged, as violative of the Rehabilitation Act, a proposal to limit Medicaid reimbursement for inpatient hospital stays to 14 days. Although the parties agreed that the limitation would have a disproportionate impact on the disabled, the Court rejected plaintiffs' claim that the disabled be singled out for more services or benefits because of their greater needs. *Id.*, at 301-302. While the Rehabilitation Act and the ADA seek to assure "evenhanded treatment and the opportunity to participate in and benefit from programs," the acts do not guarantee the disabled equal results from this access. *Id.*, at 303-304. Thus, while plaintiffs may have greater needs than able-bodied public assistance clients and the many other clients disabled by non-HIV and AIDS related disabilities, neither the ADA nor the Rehabilitation Act guarantee that all their needs will be satisfied. Relying upon *Alexander*, this Court reaffirmed in *Traynor v. Turnage*, 485 U.S. 535, 548 (1988), that "the central purpose of section 504 [of the Rehabilitation Act]...is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals."

Despite this Court's unequivocal position that an ADA or Rehabilitation Act claim must rest on the discrepancy between services provided to plaintiffs and those offered to the able-bodied, plaintiffs have provided no evidence that they have been denied access to benefits and services or have been provided benefits and services that are inferior to those provided to the able-bodied. Moreover, defendants have been denied the opportunity to present evidence that the access afforded plaintiffs is at least equal to that afforded able-bodied and otherwise disabled clients of the welfare system. More significant, plaintiffs cannot show that they have been denied access because of their disability. Although plaintiffs have described imperfections in the DASIS program and offer anecdotal accounts of hardships endured as a result of DASIS errors, such assertions do not state a claim under the federal disability statutes. The statutes do not require public entities to meet the greater needs of this disabled population, but rather require that they provide the disabled with the same access to the identical benefits provided to the able-bodied and otherwise disabled.

Plaintiffs complain of incorrect case budgets, bureaucratic delays, improper case closures, and denials of emergency benefits, as well as the quality of emergency temporary housing. However, the DASIS Quarterly

Reports to the New York City Council demonstrate that the overwhelming number of DASIS clients are provided with services and benefits expeditiously and the number of erroneous case closings, as reflected by the number of cases reopened each month, is not a systematic problem. The City of New York accommodates plaintiffs' disability by providing them with a single point of entry into the public assistance bureaucracy and by providing one office to service all their public assistance needs. Nothing in the federal statutes requires that government services be provided to the disabled in a perfect manner or that benefits and services be tailored to the particular needs of the disabled client. *Alexander v. Choate, supra,* 469 U.S. 287, 304.

In the case at bar, there is no dispute that plaintiffs are entitled to the same benefits and services provided the able-bodied. Rather, the dispute centers on the amount of benefits and services provided and the manner in which they are provided. Plaintiffs admit to receiving benefits and services, but take issue primarily with perceived errors in calculating their budgets and perceived bureaucratic delays in providing them, as well as with the quality of the services and benefits provided. [The evidence however, establishes that DASIS clients receive at least the same TANF and Safety Net, Medicaid, and Food Stamps benefits received by public assistance clients not serviced by DASIS. See *Wright v. Giuliani*, 230 F.3d 543, 544-547 (2d Cir. 2000)]. Plaintiffs' statistical evidence on the record before the Court of Appeals relates solely to the benefits, which are available only to DASIS clients pursuant to the enhanced benefits afforded by the DASIS statute.

The conflict between the Circuit Court's opinion here and its opinion in the *Wright* case cited above is direct and on point. In *Wright*, homeless DASIS clients sought a preliminary injunction, which they alleged was necessary to preserve a reasonable accommodation, which accords them meaningful access to emergency housing. Emergency housing for single adult able-bodied homeless New Yorkers is congregate housing in the City's shelter system. In contrast, a single adult homeless DASIS client is entitled under the DASIS program to medically appropriate emergency housing, which means a single room, with a place to refrigerate food and medication, and a bathroom with a locking mechanism. In *Wright*, the District Court denied the preliminary injunction because plaintiffs proffered no evidence about the City's emergency housing for able-bodied homeless residents. Plaintiffs argued that the comparison was irrelevant because they sought a reasonable accommodation, not substantive benefits. In affirming the District Court's decision, the Second Circuit, noting that the plaintiffs were in the same class as those in the instant case and resolving a mootness issue arising as a result of the District Court's decision in the instant case, rejected the plaintiffs' argument that the comparison was irrelevant:

> Plaintiffs also argue that the district court's ruling is fundamentally flawed because it impliedly holds that a claim under the disabilities statutes cannot prevail without a showing of "disparate treatment" between the disabled and non-disabled. The district court concluded that the record should be supplemented with "information about the City's emergency housing for able-bodied homeless residents" in order to ascertain what specific services the city provides to its homeless residents. Such supplementation of the record would assist a disparate treatment analysis, but we need not decide whether that analysis is helpful, because the same supplementation of the record may cast light on whether the remedial relief plaintiffs seek would effect a "fundamental"

> or "substantial" change in the DASIS program, a question that bears on the merits.

Wright, 230 F.3d at 549.

In the case at bar, the District Court excluded as irrelevant all evidence demonstrating that plaintiffs were receiving no less than the able-bodied and otherwise disabled recipients of welfare benefits, apparently because plaintiffs alleged that they did not make any claim for additional or better benefits or services. *Henrietta D. v. Giuliani,* 119 F. Supp.2d 181 at 212 (A150-A151). City defendants disputed this and should have been permitted to adduce evidence to show both that the DASIS clients were receiving their benefits in an evenhanded manner and that the "reasonable accommodation" that plaintiffs sought was actually substantive benefits not provided to the able-bodied. By excluding all testimony of the benefits and services received by the able-bodied, including the testimony of Patricia Smith and others, City defendants were prevented from showing that the relief plaintiffs sought was more than or equal to what the able-bodied received or was other than a reasonable accommodation, amounting to a "fundamental" or "substantial" change in the City's generally applicable welfare scheme.

The purpose of the federal disability statutes is to assure "evenhanded treatment." They do not "guarantee the handicapped equal results" from the provision of a particular benefit or program. *Alexander v. Choate*, *supra*, 469 U.S., at 304. Because the injunction requires DASIS to provide to its clients services and benefits that exceed those provided to nondisabled clients, the injunction should be reversed on the law. The Court of Appeals held that the injunction only provides meaningful access and therefore is a reasonable modification to the city's practices. The Court is mistaken.

First, the precluded testimony of Patricia Smith would have established that the injunction reaches substantive benefits and services, like housing placement, intensive case management, enhanced housing allowances and other benefits that are granted as exceptions to policy through the case-by-case financial assessment process, timeliness requirements, and documentation receipts – all of which are only provided to DASIS clients. These are not means to access substantive services or benefits – they are the substantive services and benefits. Accordingly, access to or the provision of them cannot be the basis for an ADA or Rehabilitation Act claim.

Second, the injunction in this case is identical to a number of provisions of the DASIS law. That law grants to DASIS clients a number of benefits and services that exceed those provided to the able-bodied. By importing the DASIS law into the injunction, the Court has in effect enacted legislation – legislation that the city council has the right to repeal. This far exceeds the court's power. *Wright*, 2000 U.S. Dist. LEXIS 8322 at *27 (S.D.N.Y.), *aff'd.,* 230 F.3d 543 (2d Cir. 2000).

Finally, if the court-imposed staffing ratios for intensive case management are a reasonable accommodation, every chronically disabled recipient of government services or benefits would be entitled to these same court-imposed staffing ratios. As indicated above, no other class of disabled persons is eligible for these benefits, either in New York or in other jurisdictions throughout the country.

II. IN A CASE WHERE LEGISLATION PROVIDES AN ENHANCED WELFARE PROGRAM TO A CLASS OF DISABLED, AN ALLEGATION THAT THE PROGRAM IS A REQUIRED REASONABLE ACCOMMODATION CANNOT SERVE AS A SUBSTITUTE FOR PLAINTIFFS'

PROVING THAT THE DISABLED ARE BEING TREATED IN A DISCRIMINATORY MANNER VIS-À-VIS THE ABLE-BODIED.

(1)

The DASIS program, while functioning in part as a "reasonable accommodation" providing "meaningful access" to benefits and services available to able-bodied individuals, is a hybrid insofar as it also provides benefits to the disabled far in excess of those provided to other public assistance clients. To the extent that DASIS is providing enhanced services not provided to others, it can hardly be held to discriminate against the disabled by reason of the fact that those benefits and services are delivered in a less than perfect manner. This is particularly the case where there has been no showing that the lesser benefits provided to the able-bodied were delivered in a more efficient way. Indeed, while plaintiffs never attempted to make a showing of either discrimination or disparate impact as the disability statutes require, the City defendants, as shown above, were precluded from demonstrating equality of treatment in the provision of services to DASIS clients and to other public assistance clients.

In essence, plaintiffs allege and the Court holds that the most generous statutory disability program in the nation is merely an ADA-mandated accommodation, whose violation *ipso facto* constitutes a violation of the federal disability discrimination acts. We submit that plaintiffs have an affirmative obligation to prove that *requiring* the City to provide DASIS benefits as an ADA-mandated reasonable accommodation does not work a "fundamental" or "substantial" change in its welfare policies and does not constitute an unreasonable burden on the municipal fisc. In the alternative, plaintiffs need to demonstrate an inequality of benefits and services in favor of the able-bodied.

Thus, while plaintiffs may be dissatisfied with the adequacy of the services and benefits provided by DASIS, they cannot state a claim under the disability discrimination statutes unless they can demonstrate that the able-bodied receive services and benefits to which the plaintiff class is being denied access or receive them in a substantially inferior manner to that in which the able-bodied receive them. Absent such a showing, they are not without remedy, as demonstrated by the aftermath of the decision in *Wright v. Giuliani, supra,* 230 F.3d 543. When the case was remanded to the district court to supplement the record in order to determine whether the remedial relief would effect fundamental or substantial changes in the DASIS program, plaintiffs discontinued their federal action and filed an mandamus proceeding in state court, successfully seeking enforcement of the statute. See, *Winds v. Turner*, New York Law Journal, 9/18/02, Vol. 228, p. 19, col. 2.

Plaintiffs in the instant action are provided with access to at least the same benefits and services available to all other public assistance recipients. In fact, although plaintiffs take issue with the amount of benefits and perceived delays in the provision of services, the affidavits, deposition testimony, and the trial testimony of the intervenors establish that they do receive public assistance benefits and services. Moreover, the DASIS quarterly reports demonstrate that the overwhelming majority of applications for public assistance benefits are granted in less than 25 days and special grants (CBCFAs) not available to the able-bodied are generally approved in less than three days. In light of the fact that New York State permits localities up to thirty days to process applications and another 15 days before actually providing benefits, DASIS clients appear to receive benefits and services more expeditiously than able-bodied public assistance applicants.

The District Court identified the issue in this case in its October 25, 1996 decision on plaintiffs' motion for a preliminary injunction and City Defendants' motion to dismiss as "whether plaintiffs are being excluded from, or denied public assistance benefits or services by reason of their disability." *Henrietta D.*, 1996 U.S. Dist. LEXIS 22373, at *20. To assess whether plaintiffs are being denied equal and meaningful access to public assistance benefits or services available to other public assistance recipients in New York City, the District Court needed evidence regarding the benefits and services available to non-DASIS clients, as well as evidence relating to how those public assistance benefits and services are processed and distributed to non-DASIS clients. Without knowing what benefits and services are available to others, the Court could not determine whether DASIS clients have equal access to the same benefits provided to the non-disabled. It was clearly plaintiffs' burden to provide such evidence, which burden they made no attempt to meet. When City defendants, however, sought to have Patricia Smith, the Executive Deputy Commissioner of the Family Independence Administration of the City Human Resources Administration ("FIA"), testify at trial regarding this essential information, the Court excluded her testimony.

Because City Defendants are not required to "fundamentally alter" the nature of the program and services it offers to persons not disabled by HIV or AIDS, Ms. Smith's testimony was essential because information about the nature of the program and services provided to the overwhelming majority of public assistance recipients not disabled by HIV or AIDS was necessary in order to determine whether any further accommodations demanded by plaintiffs were "reasonable" or would "fundamentally alter the nature of the program or would pose an undue hardship."

While plaintiffs need not prove a "disparate treatment" case, they must prove disparate impact. In *Alexander v. Choate*, *supra,* 469 U.S., at 299, this Court stated in *dicta* that § 504 ("The Rehabilitation Act") reaches some conduct that has an unjustifiable disparate impact on people with disabilities. The Court also stated that the interpretation of the statute must be "responsive to two powerful but countervailing considerations – the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." To determine what types of disparate impact may be prohibited, the Court looked to its decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), which it said stood for the proposition that an otherwise qualified handicapped individual must be provided with "meaningful access" to a benefit provided to others.

City Defendants recognized as early as 1985 that the facially neutral policies of the precursor of FIA might have a disparate impact on persons disabled by HIV and AIDS. In response, the City created a program, which acted as a reasonable modification to its welfare program while also providing additional benefits not otherwise available to the non-disabled. This program ultimately became DASIS. In the instant case, the question is whether DASIS continues to function as a reasonable modification to FIA. Consequently, to prevail, plaintiffs must show that DASIS is not providing them with equal and meaningful access to the benefits and services that are provided through FIA. This plaintiffs entirely failed to do and thereby failed to meet their burden of proof. With or without evidence supplied by City defendants, plaintiffs failed to prove a violation of federal statute. Patricia Smith's testimony, however, would have enabled the District Court to make findings with respect to the benefits and services available to public assistance, food stamp and Medicaid recipients not served by DASIS and then determine whether plaintiffs have equal and meaningful access to those benefits and services.

(3)

In many ADA cases, there is often an implied, though clear, proof of discrimination in treatment of the disabled as compared with the able-bodied. In the case at bar, however, no discrimination can be implied from the facts and the record is entirely devoid of any proof of discrimination based upon plaintiffs' disabilities.

In *Marcano-Rivera v. Pueblo Int'l, Inc.,* 232 F.3d 245 (1st Cir. 2000), for example, the discrimination is implied in the fact that plaintiff is wheelchair-bound and her co-workers are not. The discrimination resulted from the fact that the plaintiff was not permitted to use handicapped parking, *inter alia*, something clearly necessary for her condition and not necessary for her able-bodied colleagues. The discrimination which constitutes the basis for invoking the ADA is the difference in the employer's treatment of the handicapped plaintiff by not reasonably accommodating her. Implied in the discrimination is the fact that her able-bodied co-workers can do their job without any reasonable accommodation. The critical distinction between *Marcano-Rivera*, as well as most other cases involving employment situations, and the case at bar is that in those cases there is a presumption that the general population of workers are able-bodied and that it is, therefore, discriminatory not to provide an accommodation to the disabled worker to enable her to perform her job. Such a presumption, however, is unwarranted in situations like the instant case where programs for the provision of general categories of welfare benefits and services are involved and the issue is whether the able-bodied are receiving their benefits and services more fully and efficiently than the plaintiffs, who are disabled. We submit that this is the discrimination which plaintiffs must demonstrate in order to invoke the protection of the ADA; it cannot be implied from the facts of this case, as it can be in the employment cases.

In the case at bar, there is no question that the City has made an accommodation in order for plaintiffs to have meaningful access to the welfare benefits to which they are entitled. They allege that they are not receiving these benefits adequately and in an efficient and timely manner as a class. But unless they can demonstrate discrimination in that they are being treated less favorably than others because of their disability, they have not stated a claim under the ADA.

As indicated above, the DASIS program is a hybrid insofar as it provides enhanced benefits in some categories, over and above what is provided to the able-bodied in the FIA program, as well as servicing DASIS clients in a more personalized manner, even in categories where the benefits are the same as those in the FIA program. To the extent that the benefits under DASIS are substantively better than under FIA, plaintiffs cannot assert a claim under the ADA . To the extent that plaintiffs claim that they are unable to access services in a manner that meets their needs, they do not state a claim under the ADA unless they can demonstrate that other recipients without their disability are able to access the benefits more effectively. Otherwise there is no discrimination and, therefore, no ADA violation.

It should be noted that most of the cases cited by the Court of Appeals arise from violations of Title I of the ADA in an employment context and none deal with the administration of a large welfare program as in the case at bar. See SA-76-SA-79). In *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996), the plaintiff sued under the ADA because his employer failed to accommodate his mental disability. The Court recognized that he was not claiming that he was being treated differently from other employees, but was rather claiming that the employer was required to reasonably accommodate him so that he would be able to perform the essential functions of his position as do other workers. Id., at 1285. The employer's refusal to accommodate constitutes the discrimination because without the accommodation, he remains unequal to his non-disabled co-workers. Unlike *Bultemeyer*, however, in the instant case the "reasonable accommodation" that plaintiffs demand may not be necessary to place them on an equal footing with the non-disabled welfare recipients since plaintiffs have not shown what benefits they receive and in what manner they receive them and defendants have been precluded by the District Court from demonstrating that no discrimination exists. The lesson here is that there is a fundamental difference between cases involving employment issues and those involving the administration of benefit programs for purposes of determining if there has been a violation of the disability statutes.

The same difference even exists between benefit program cases and other Title II cases. In *Matthews v. Jefferson*, 29 F. Supp. 2d 525 (W.D. Ark. 1998), plaintiff, a paraplegic, sued a county under Title II of the ADA for its failure to make its courthouse accessible to paraplegics. As in the examples above, there need be no proof that the able-bodied have unimpeded access to the courthouse; it is implied because it is obvious. The Court held that the county was obligated to make the courthouse as readily accessible as it was to the able-bodied. In reaching its judgment, the Court, at 532, quoted *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996), where the *Crowder* Court stated that Title II "intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services *disproportionately* due to their disability" (emphasis added). In the instant case, however, there is no evidence that the plaintiff class is being denied public services disproportionately due to their disabilities. Nor, we submit, can a disproportionate denial of welfare services be implied since, unlike in *Matthews* where the accessibility of the able-bodied is a given, the question of what percentage of the able-bodied are able to access their benefits as administered currently by the City is not a given and cannot be assumed. Evidence is required.

Since discrimination based upon disability is the gravamen of any cause of action pursuant to the ADA or the Rehabilitation Act and, in situations involving the administration of welfare benefits, a disparity between benefits received by able-bodied and the disabled cannot be inferred or presumed, failure to offer evidence of a disparity is fatal to plaintiffs' claim.

CONCLUSION

This case presents the Court with the opportunity to clarify whether discrimination is a requisite ingredient in a Title II ADA claim involving the administration of a large welfare program where reasonable modification is sought.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Fall Term, 2002

(Argued: September 26, 2002 Decided: June 9, 2003)
(Errata Filed: June 18, 2003)

Docket Nos. 02-7022(L), 02-7074(CON)

HENRIETTA D., HENRIETTA S., SIMONE A., EZZARD S., JOHN R., PEDRO R., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

-against-

MICHAEL R. BLOOMBERG, Mayor of the City of New York, MARVA HAMMONS, Administrator of the New York City Human Resources Administration and Commissioner of the New York City Department of Social Services, and MARVA E. GLASS, Commissioner of the New York State Department of Social Services,

Defendant-Appellants.

Before:

MESKILL, SACK, AND KATZMANN, Circuit Judges

Defendants appeal from a judgment of the United States District Court for the Eastern District of New York (Johnson, J.), finding defendants Giuliani [1] and Hammons liable in their official capacities for violations of Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12131–213) and its implementing regulations; section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and its implementing regulations; various provisions of the Medicaid Act and its implementing regulations (42 U.S.C. § 1396a(a)(8), (19), 42 C.F.R. § 206.10(a)(i), 42 C.F.R. § 435.911(a), (b), 42 C.F.R. § 460.2(a), and 7 C.F.R. § 273.2); various provisions of the New York State Constitution and the New York State Social Services Law and implementing regulations and administrative directives; and the Due Process Clauses of the United States Constitution, and finding defendant Glass liable for violations of the same provisions of the ADA and Rehabilitation Act violated by defendants Giuliani and Hammons.

Affirmed.

SUSAN J. KOHLMANN (Karen B. Dine, David Oakland, Carolina A. Fornos, Heather Bridgid Conoboy, on the brief), Pillsbury Winthrop LLP, New York, New York; Victoria Neilson, HIV Law Project, New

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[1] Pursuant to Fed. R. App. P. 43(c)(2), Michael R. Bloomberg has been substituted for the former defendant, Rudolph Giuliani.

York, NY; Armen H. Merjian, Jennifer Sinton, Virginia Shubert, Housing Works, Inc., New York, New York, on behalf of Plaintiffs-Appellees, 3 EDWARD F. X. HART, Assistant Corporation Counsel (Leonard Koerner, Georgia M. Pestana, on the brief), for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, New York, on behalf of Defendants-Appellants Rudolph Giuliani and Marva Hammons, VINCENT LEONG, Assistant Attorney General (Michael S. Belohlavek, Deputy Solicitor General, Deon Nossel, Assistant Solicitor General, on the brief), for Eliot Spitzer, Attorney General of the State of New York, New York, New York, on behalf of Defendant-Appellant Mary E. Glass, Ralph F. Boyd, Jr., Assistant Attorney General, Jessica Dunsany Silver, Seth M. Galanter, Attorneys, United States Department of Justice, Civil Rights Division, Appellate Section-PHB, Washington, DC, on behalf of Amicus Curiae the United States.

KATZMANN, Circuit Judge:

The plaintiffs in this civil rights litigation, indigent New York City residents who suffer from AIDS and other HIV-related illnesses, are clients of New York City's Division of AIDS Services and Income Support ("DASIS"), an agency whose sole function is to assist persons with HIV-related diseases in obtaining public assistance benefits and services. The plaintiffs allege that in spite of DASIS's existence (and in part due to DASIS's ineffectiveness), New York City and New York State are failing to provide them with adequate access to public benefits, and are thereby violating various federal and state statutes, regulations, and constitutional provisions.

Following a bench trial in the United States District Court for the Eastern District of New York (Johnson, J.), the District Court found in plaintiffs' favor, holding that defendants Rudolph Giuliani, as then-Mayor of New York City, and Marva Hammons, as Administrator of the New York City Human Resources Administration and the Commissioner of the New York City Department of Social Services (together, the "city defendants"), by failing to provide adequate access to public benefits and services, had "violated Title II of the Americans with Disabilities Act of 1990 [(the "ADA")], 42 U.S.C. § 12131 *et seq.* and its implementing regulations; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and its implementing regulations; 42 U.S.C. §§ 1396(a)(8), (a)(19) [sic], [2]. . 42 C.F.R. §§ 435.911(a) and (b), and 7 C.F.R. § 273.2, and 42 C.F.R. § 206.10(a)(i); New York State Social Services Law and implementing regulations and administrative directives; the Due Process clause of the New York State and United States Constitutions; and Article XVII, Sections 1 and 3 of the New York State Constitution." *Henrietta D. v. Giuliani*, 119 F.Supp.2d 181, 220–21 (E.D.N.Y. 2000). It also held defendant Mary E. Glass (the "state defendant"), as Commissioner of the New York State Department of Social Services, vicariously liable for violating the same provisions of the ADA and the Rehabilitation Act based on the violations of the city defendants. *Id.* at 221. The District Court ordered injunctive relief against all defendants. All defendants appeal the District Court's findings of liability against them and the District Court's imposition of injunctive relief. Because we conclude that the alleged general failure of New York City's public benefits system in this case does not excuse the city defendants from their duty under the ADA and the Rehabilitation Act to ensure that the plaintiff class-members have meaningful access to the benefits to which they are facially entitled, we affirm as to those defendants. Additionally, because we agree with the District Court that the state defendant was subject to suit under the ADA, not shielded by sovereign immunity, and possessed of an obligation to supervise the effective delivery of benefits granted as part of New York State's agreement with the United States, we also affirm as to the state defendant.

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[2] Although the District Court states that the violations are of § 1396(a)(8), (19), it is apparent from context that it meant to find the city defendants liable under § 1396a(a)(8), (19).

Background

The certified plaintiff class consists of "[a]ll DAS-eligible [3] persons, i.e., persons who are New York City residents, are Medicaid eligible and meet the medical condition of having either (1) CDC-defined AIDS, or (2) an HIV-related condition and a need for home care services." *Henrietta D. v. Giuliani*, No. 95 Civ. 0641, 1996 WL 633382, at *16 (E.D.N.Y. Oct. 25, 1996). The members of the class assert that they face unique physical hurdles in attempting to access certain public assistance benefits and services. They claim that DASIS, the New York City agency charged with helping them access such benefits and services, is ineffective and systemically fails to achieve its goals. The plaintiffs seek injunctive relief ordering the defendants, various city and state officials charged with implementing New York's social services system, to provide the benefits to which the plaintiff class is entitled.

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[3] DAS was one of two predecessor entities that were merged in 1997 to form DASIS. The definition of DAS-eligible persons reflects the official definition in 1996, when the class was certified. The current definition of DASIS-eligible individuals—" every person with clinical/symptomatic HIV illness, as determined by the New York state department of health AIDS institute, or

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with AIDS, as defined by the federal centers for disease control and prevention"— is similar. N.Y. City Admin. Code § 21-126.

1. The Social Services Network

Before turning to the plaintiffs' specific complaints, it is necessary briefly to canvass the structure of the New York public benefits system. Congress has authorized the grant of federal money to consenting States in exchange for promises that the States will provide to qualifying individuals certain forms of public assistance, such as food stamps, welfare benefits, and Medicaid coverage. *See, e.g.*, 7 U.S.C. §§ 2011–2036 (food stamps); 42 U.S.C. §§ 601–619 (assistance to needy families); 42 U.S.C. §§ 1396–1396v (Medicaid). Pursuant to such a federal-state cooperative program, New York provides eligible New Yorkers with public financial assistance benefits, *See, e.g.*, N.Y. Soc. Serv. Law §§ 131-a, 157 to 59, 348 to 49, Medicaid benefits, *See* N.Y. Soc. Serv. Law §§ 363 to 39, and food stamps, *See* N.Y. Soc. Serv. Law § 95.

The New York State Department of Social Services [4] oversees the statewide benefits system, but the programs are administered on a day-to-day basis by 58 local county districts, one of which is New York City. *See* N.Y. Soc. Serv. Law § 61. "In the administration of public assistance funds, whether they come from Federal, State, or local sources, the authority and responsibility is that of the county commissioners of social services, not the counties; the local commissioners act on behalf of and as agents for the State." *Beaudoin v. Toia*, 380 N.E.2d 246, 247 (N.Y. 1978). While the local agencies operate the benefits system, including processing applications for benefits and making eligibility determinations, the state agency is required to "supervise all social services work." N.Y. Soc. Serv. Law § 20(2)(b). The state agency oversees the local districts largely through administration of a "fair hearing" system whereby applicants for, and recipients of, state-provided public benefits may challenge local district decisions before an impartial administrative law judge, and may ultimately seek judicial review. *See* N.Y. Soc. Serv. Law § 22. Thus, both the city defendants and the state defendant play a role in the administration of New York's social services system, and the nature of the relationship between the state defendant and the city defendants is a key issue that we explore below.

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[4] The New York State Department of Social Services has been reconstituted as the New York State Department of Family Assistance. *See* 1997 N.Y. Laws, ch. 436, § 122 (a). For ease of discussion, this opinion, like that of the District Court and like the Social Services statute itself, continues to use the names and titles in effect at the beginning of this litigation. It should also be noted that effective January 1, 1996, the New York State Department The New York State Department of Social of Social Services transferred partial control of the Medicaid program to the New York State Department of Health, although it appears that the state defendant continues to

2. DASIS

The City of New York sought in 1997 to assist its HIV-afflicted residents in their efforts to access public services and benefits by combining under one umbrella several city

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oversee fair hearings with respect to Medicald. *See* 1996 N.Y. Laws, ch. 474, § 233.

agencies that endeavored to assist that population. *See* N.Y. City Admin. Code § 21-126 *et seq.* ("the DASIS law"). The DASIS law aims to "provide access to [publicly subsidized benefits and services] to every person with clinical/symptomatic HIV illness . . . or with AIDS." N.Y. City Admin. Code § 21-126. The DASIS law specifically locates DASIS within the New York City Department of Social Services. *See Id.* ("There shall be a division of AIDS services within the New York City Department of Social Services.").

The DASIS law imposes procedural rules designed to facilitate access to existing federal, state, and local welfare benefits and also mandates certain benefits that can arguably be characterized as additional substantive benefits. Procedural rules include, for example, an "intensive case management" requirement with specified minimum caseworker-client ratios, *See* N.Y. City Admin. Code § 21-127, and a requirement that services or benefits be provided within twenty business days of an application where no law or regulation provides a different time frame, *See* N.Y. City Admin. Code § 21-128(c)(2). Most of the services and benefits to which DASIS helps facilitate access are programs available to non-disabled individuals in addition to the plaintiff class, and the DASIS law makes clear that "[a]ny eligible person shall receive only those benefits and services for which such person qualifies in accordance with the applicable eligibility standards established pursuant to local, state or federal statute, law, regulation or rule." *Id.* at § 21-128(b). Some of the services to which DASIS is intended to facilitate access, however, are available only to those afflicted with HIV-illness. *See*, e.g., N.Y. Comp. Codes R. & Regs. tit. 18, § 352.3(k)(1) (providing emergency shelter allowances for the HIV-afflicted population); N.Y. City Admin. Code § 21-128(b) (providing for access to enhanced rental assistance for the HIV-afflicted population and their family members residing with them). Additionally, the DASIS law requires continued provision of "transportation and nutrition allowances" in the same amounts that they had been provided prior to enactment of the DASIS law (although the city council and the mayor retain the power to adjust the amounts in the event of a "material reduction" in the state's "funding allocation"). *See* N.Y. City Admin. Code § 21-127. As we discuss below, an issue in this litigation is whether the DASIS law represents an attempt to provide the plaintiff class with additional, substantive benefits unavailable to other members of the population (as the defendants contend) or whether (as the plaintiffs contend) the DASIS law aims merely to provide an accommodation to the plaintiff class designed to facilitate meaningful access to benefits available to other similarly situated people.

3. Factual Findings With Respect To DASIS

Against this backdrop, we turn to the District Court's findings with respect to the plaintiffs' allegations that DASIS has failed adequately to provide the services it is supposed to provide. The District Court's extensive and thorough findings of fact are set forth in its reported opinion, *Henrietta D.*, 119 F.Supp.2d at 184–204, and we pause here only to emphasize the key facts relevant to this appeal. As an initial matter, the District Court, after hearing the testimony of several individuals afflicted with HIV-related illness, agreed with the plaintiffs that the physical challenges and medical risks faced by the plaintiff class create unique barriers with respect to obtaining access to public benefits and services:

> People living with HIV and AIDS develop numerous illnesses and physical conditions not found in the general population, and experience manifestations of common illnesses that are much more aggressive, recurrent, and difficult to treat. Infections and cancers spread rapidly in a person whose immune system has been compromised, and the effectiveness of medicine is diminished by nutritional problems that limit the body's ability to absorb what is ingested. Illnesses that are not lethal to the general population can kill an HIV-infected person. For all these reasons, persons with AIDS and HIV-related disease experience serious functional limitations that make it extremely difficult, if not impossible in some cases, to negotiate the complicated City social service system on their own.
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> * * *
>
> The opportunistic infections and chronic conditions that result from a weakened immune system limit the HIV-infected person's ability to engage in regular activities of daily life such as traveling, standing in line, attending scheduled appointments, completing paper work, and

> otherwise negotiating medical and social service bureaucracies . . . .
>
> Functional limitations also develop from the primary drugs used to combat AIDS and HIV-related disease. . . . An individual receiving this common regime of prescription drugs likely will be restricted in his or her ability to walk, stand, or travel. Other side effects include enhanced neuropathy, diarrhea, nausea, and vomiting.
>
> * * *
>
> The requirement that persons with AIDS and advanced HIV disease travel to and wait in infection-ridden public waiting rooms can be dangerous, and even life-threatening, for this population, all of whom suffer from severely weakened immune systems.

Id. at 185–86 (internal citations and paragraph numbering omitted).

The District Court concluded that DASIS was designed to address these obstacles, and most of the testimony at trial dealt with the plaintiffs' allegations that DASIS generally failed to provide the services that it was mandated by law to provide. After hearing testimony from DASIS clients, DASIS employees, advocates for DASIS clients, and experts, the District Court concluded that the allegations were well-founded, finding that DASIS was "chronically and systematically failing to provide plaintiffs with meaningful access to critical subsistence benefits and services, with devastating consequences." *Id.* at 209.

The District Court discussed several different aspects of the evidence in reaching this conclusion. First, it cited the testimony of various plaintiffs who had testified that they frequently had limited contact with DASIS caseworkers and often had received untimely responses or no response to requests made through DASIS. *See Id.* at 186–95. Second, the District Court noted that the testimony of two individuals who had assisted DASIS clients supported the testimony of the DASIS clients that DASIS was disorganized and often unresponsive. *Id.* at 195–99. For example, the Director of the Legal Advocacy Program of Bronx AIDS Services testified that she had "experienced extensive problems in working with clients trying to access benefits and services through DASIS," and that "(i) there [were] problems reaching case workers, (ii) her clients' public assistance cases ha[d] been improperly terminated without notice or adequate notice, and (iii) she had experience[d] significant problems with regard to relocating clients, including having clients lose apartments or face eviction because of DASIS'[s] failure timely to assist the clients." *Id.* at 195–96 (internal quotation marks omitted). She further testified that she had encountered "daily problems reaching case managers that include calling but the case manager's phone is off the hook, not having her calls returned or not receiving a response to written correspondence or waiting several hours at a DASIS office to speak to someone concerning one of her clients." *Id.* at 196.

Third, the District Court pointed to a statistical analysis of DASIS's performance in processing thirty-one rental assistance applications, prepared by Dr. Ernest Drucker, a professor of epidemiology and social medicine at Montefiore Medical Center who specializes in examining AIDS and its effects on the New York City population. *Id.* at 199. The District Court summarized the results of the report:

> In over 77% of [the cases analyzed], the City failed to meet its own mandated time frames of 20 business days or approximately 30 calendar days. For those applicants who were not acted upon with [sic] the legally mandated time frames, the median length of time was 63 days but the range for applicants was up to 132 calendar days. The considerable delays in the approval of rental assistance shown in this report provide probative evidence of delays that are typical and systemic.

Id. at 199-200. The District Court concluded with respect to the Drucker study that "the foregoing facts credibly demonstrate systemic problems in DASIS' efficient and timely administration of benefits." *Id.* at 203.

Fourth, the District Court noted that even a key DASIS official had acknowledged the failure of DASIS to properly monitor its caseload:

> Deputy Commissioner Caldwell testified that DASIS was not fully in compliance with the legal requirements of the DASIS Law in either December 1997 or in June 1998, and is not today fully compliant with

> the DASIS Law. Deputy Commissioner Caldwell further admitted that, despite the mandates of the DASIS Law, DASIS does not track the length of time required to process requests for many benefits and services, including those administered by the State; the total number of persons placed in permanent housing; the average length of time to reopen cases closed; or the average length of time required to comply with fair hearing decisions.

Id. at 203 (internal citations and paragraph numbering omitted).

4. The District Court Ruling

The District Court held that the plaintiffs had demonstrated that they required special accommodations in order to access public benefits and services, and concluded that the DASIS law, if properly complied with, would provide the necessary accommodations to the HIV-positive population, *Id.* at 208, but that DASIS was not functioning as the DASIS law had intended:

> At this time, the Court finds that plaintiffs demonstrated at trial that . . . DASIS . . . is broken, i. e., that defendants are failing to make the reasonable accommodations necessary to ensure plaintiffs meaningful access to, and an equal opportunity to benefit from, the social welfare benefits and services that defendants provide to eligible New York City residents. The extensive

> evidence proffered at trial—from representative plaintiffs, from some of the City's largest providers of services to the plaintiff class, from expert testimony, and from the City's own performance-tracking reports—establishes unequivocally that defendants are chronically and systematically failing to provide plaintiffs with meaningful access to critical subsistence benefits and services, with devastating consequences.

Id. at 209.

Based on these findings and conclusions, the District Court ruled in the plaintiffs' favor, holding that New York City had failed to provide the plaintiffs with meaningful access to public assistance benefits and services in violation of Title II of the ADA and section 504 of the Rehabilitation Act. Specifically, the District Court found that the DASIS law provided the reasonable accommodations requested by the plaintiffs, and that the City's failure to comply with the DASIS law violated the ADA and the Rehabilitation Act. *Id.* at 208–09, 214. The District Court also found the state defendant liable for violating the ADA and § 504 based on her failure to supervise New York City in the provision of public benefits and services. *Id.* at 216-17.[5]

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[5] The District Court had previously dismissed all state law claims against the state defendant on Eleventh Amendment grounds. *See Henrietta D. v. Giuliani*, 81 F.Supp.2d 425, 431 (E.D.N.Y.2000).

At the trial, the District Court had precluded the defendants from introducing evidence designed to demonstrate that the plaintiffs were in fact receiving benefits on terms no worse than other individuals qualified to receive the same public benefits. Specifically, the defendants had hoped to have Patricia Smith, the Executive Deputy Commissioner of the Family Independence Administration of the City Human Resources Administration, testify about the manner in which services are provided to the non-disabled. The District Court explained its preclusion of the evidence in its opinion, holding that "[p]laintiffs have alleged, and demonstrated, that defendants have failed to provide them with the reasonable accommodations required by the federal disability statutes, thus failing to ensure them meaningful access to the benefits to which they are entitled," and that "[a] comparison with the manner in which benefits are administered to the non-disabled is thus not required, for the question of equality of administration is irrelevant to a claim for reasonable accommodations." *Id.* at 213.

In addition to finding the city defendants and the state defendant liable under the ADA and the Rehabilitation Act, the District Court also found the city defendants liable for violations of the Medicaid Act and its implementing regulations, as well as for violations of the New York State Social Services Law and its implementing regulations and administrative directives, based on the city's repeated terminations of welfare benefits without adequate notice and hearing. *Id.* at 214–16, 219–20. The District Court further held that the city defendants' failure to provide the plaintiff class with adequate access to benefits violated the New York State Constitution's mandate that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions." *Id.* at 217–19 (quoting N.Y. Const. Art. 17 § 1).

The District Court's conclusions of law announced its intention to award the plaintiffs both declaratory and permanent injunctive relief. *See Id.* at 204, 214. It "retain[ed] full jurisdiction over compliance with this judgment," but referred the matter to "the Honorable Cheryl L. Pollak, United States Magistrate Judge to will [sic] monitor compliance with the terms of this order for a period of three years from this date." *Id.* at 221. It stated that "Magistrate Judge Pollak shall have the power to compel compliance with the requirements of this judgment, and to recommend penalties and sanctions in the event of noncompliance." *Id.*

Prior to finalization of the form of injunction by the Magistrate Judge, the defendants attempted to appeal the District Court's judgment in plaintiffs' favor to this court. However, we dismissed the appeal for lack of jurisdiction, holding that the judgment of the District Court was not final (and thus not yet appealable under 28 U.S.C. § 1291) until the permanent injunction was issued by the District Court. *See Henrietta D. v. Giuliani*, 246 F.3d 176, 180–81 (2d Cir.2001). We rejected the contention that we had jurisdiction based on 28 U.S.C. § 1292(a)(1) 's exception to 28 U.S.C. § 1291, which permits interlocutory review of the grant of injunctions, holding that the mere fact that the District Court had ordered the fashioning of injunctive relief and compliance with various statutes was not enough to trigger interlocutory review and that jurisdiction in the Second Circuit would lie only once the "plaintiffs are granted at least part of the ultimate, coercive relief they seek." *Id.* at 182–83.

In a decision dated December 11, 2001, the District Court, over several objections by the defendants, accepted and issued an injunctive order prepared by the Magistrate Judge. The injunction provides that

> [t]he City of New York, through [DASIS] . . . shall (a) provide access to public benefits and services to every person with clinical symptomatic HIV illness or with AIDS who requests assistance and (b) ensure the provision of public benefits and services to eligible persons with clinical/symptomatic HIV illness or with AIDS, and (c) comply with all legally-mandated time frames for the delivery of benefits and services.

In addition, the injunction requires DASIS to provide "intensive case management" and to maintain specified ratios of caseworkers and supervisors to cases at each field office. It also requires DASIS to enact a number of procedural reforms designed to provide clearer recordkeeping, more efficient response to requests, and meaningful and efficient explanation and notice of actions on benefit applications. The order requires the City to "appoint a representative to handle all problems that DASIS clients are experiencing as reported by Plaintiffs' counsel or their representative 'Troubleshooter.'" The plaintiffs' counsel and their representatives have the right "to conduct on-site inspections of DASIS centers" to monitor compliance with applicable law. The order also requires that the state defendant "supervise" the city defendants' compliance with the order, and that the state defendant institute a number of procedural reforms with respect to the fair hearing process it oversees.

Both the city and state defendants appeal.[6] The city defendants argue that the facts found by the District Court do not establish a violation of the ADA, the Rehabilitation Act, or the Medicaid Act, and argue that because in their view no violation of federal law was demonstrated, the District Court should have declined to exercise pendent jurisdiction over the state law claims. The state defendant notes its agreement with the city defendants that none of the defendants violated the relevant statutes and regulations, but contends that even if the city defendants violated federal law, the District Court erred in imposing liability on the state defendant.

Discussion

We review a district court's bench trial findings of fact for clear error and its conclusions of law *de novo*. *See Celardo v. GNY Auto. Dealers Health & Welfare Trust*, 318 F.3d 142, 145 (2d Cir.2003). Factual findings should "not be set aside unless they are without adequate support in the record, are against the clear weight of the evidence, or are the product of an erroneous view of the law." *Ezekwo v. New York City Health & Hosps. Corp.*, 940 F.2d 775, 780 (2d Cir.), *cert. denied*, 502 U.S. 1013 (1991). "We may overturn an order granting a permanent injunction 'if the district court relied upon a clearly erroneous finding of fact or incorrectly applied the law.'" *Rodriguez v. City of New*

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[6] We note that following the September 26, 2002 oral argument before this court, the parties were directed to a follow-up conference with the staff counsel of the Second Circuit in an effort to determine whether they could resolve their differences. They were unable to reach agreement.

York, 197 F.3d 611, 614 (2d Cir.1999) (quoting *Gen. Media Communications, Inc. v. Cohen*, 131 F.3d 273, 278 (2d Cir.1997)), *cert. denied*, 531 U.S. 864 (2000).

I. The ADA and the Rehabilitation Act

A. Whether the Plaintiffs Have Established That They Are Entitled to a Reasonable Accommodation

The ADA was enacted to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (2000). Its first three titles proscribe discrimination against individuals with disabilities in employment and hiring (Title I), access to public services (Title II), and public accommodations (Title III). The plaintiffs in this case rely upon the anti-discrimination provision of Title II, which provides as follows: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act similarly provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (2000).

As the District Court correctly noted, "[a]lthough there are subtle differences between these disability acts, the standards adopted by Title II of the ADA for State and local government services are generally the same as those required under section 504 of federally assisted programs and activities." *Henrietta D.*, 119 F.Supp.2d at 206 (internal quotation omitted). Indeed, unless one of those subtle distinctions is pertinent to a particular case, we treat claims under the two statutes identically. *See Weixel v. Bd. of Educ.*, 287 F.3d 138, 146 n. 6 (2d Cir.2002); *Rodriguez*, 197 F.3d at 618 ("Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider these claims in tandem."); *Cercpac v. Health & Hosps. Corp.*, 147 F.3d 165, 167 (2d Cir.1998). None of the distinctions between the two statutes is relevant here. Accordingly, the District Court properly "consider[ed the] . . . ADA and Rehab Act claims together," *Henrietta D.*, 119 F.Supp.2d at 206, and we do so as well.

In order to establish a violation under the ADA, the plaintiffs must demonstrate that (1) they are "qualified individuals" with a disability; (2) that the defendants are subject to the ADA; and (3) that plaintiffs were denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or were otherwise discriminated against by defendants, by reason of plaintiffs' disabilities. *See Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir.1998). Additionally, to establish a violation under the Rehabilitation Act, a plaintiff must show that the defendants receive federal funding. *Id.* The defendants concede that the plaintiffs are qualified individuals with disabilities, that the defendants receive federal funding, and that the city defendants are subject to both the ADA and the Rehabilitation Act. The defendants deny, however, that plaintiffs have proven that they have been discriminated against because of their disability as that concept is defined under the ADA and Rehabilitation Act.

The defendants argue that because the plaintiffs have not demonstrated that they are receiving less access than persons without disabilities to the services they seek, they have failed to show that they are "denied the benefits of the services, programs, or activities of a public entity," 42 U.S.C. § 12132, "*by reason of [their] disability,*" Id. (emphasis added), rather than as 19 a result of other forces (such as systemic breakdowns within the entire social services system) that affect the non-disabled as well as the plaintiffs. The plaintiffs counter that they have demonstrated the requisite causal relationship based on the District Court' s findings that the plaintiff class, *because of the disabilities faced by its members*, requires special accommodations in order to obtain meaningful access to social service benefits. They argue that they therefore need only show that such accommodations are not adequately being made available, and that they are not required to demonstrate disparate impact. The question, then, is whether a Title II plaintiff, to succeed on a claim alleging failure reasonably to accommodate, must also establish an adverse disparate impact on persons with the plaintiff's kind of disabilities.

1.

We first note that the plaintiffs advance a "reasonable accommodation" claim, 42 U.S.C. § 12112(b)(5)(A); *Alexander v. Choate*, 469 U.S. 287, 300–01 (1985), and, contrary to the defendants' characterization, do not expressly rely on a theory of disparate impact. Our threshold question therefore is whether a Title II plaintiff who wishes to proceed on a reasonable accommodation theory must in any event also establish disparate impact. Put another way, we must determine whether the "concept of discrimination" embraced by the ADA demands that plaintiffs identify a "comparison class" of "similarly situated individuals given preferential treatment." *Olmstead v. L.C.*, 527 U.S. 581, 598 (1999) (plurality op.). We follow our fellow circuits, and the suggestions of the *Olmstead* plurality, in concluding that it does not.

Our analysis of the requirements of a reasonable accommodation claim begins with the Supreme Court's opinion in *Choate*. There, in interpreting the scope of section 504 of the Rehabilitation Act, the Court suggested that the relevant inquiry asks not whether the benefits available to persons with disabilities and to others are actually equal, but whether those with disabilities are as a practical matter able to access benefits to which they are legally entitled. *See Choate*, 469 U.S. at 301. The Court explained that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. . . . [t]o assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Id.*

The obligation reasonably to accommodate derives from the statute itself. Title I of the ADA states that "the term 'discriminate' includes . . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. §

12112(b)(5)(A).[7] In interpreting the statutory terms we look to the views of the Justice Department, which was charged by Congress with issuing regulations implementing both the ADA and Section 504. *See Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 n. 8 (2d Cir.1997); *See also Olmstead*, 527 U.S. at 598 (reserving question whether Justice Department regulations are entitled to mandatory deference, but observing they at least "warrant respect").

The Justice Department's regulations, as we understand them, do not require a showing of disparate impact in reasonable accommodation cases. The Department's ADA regulations prohibiting "discrimination" provide in relevant part that:

> A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

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[7] "[T]he definition of 'disability' applies to all of the ADA." *Felix v. New York City Trans. Auth.*, 324 F.3d 102, 105-06 (2d Cir.2003) (citing *Toyota Motor Manuf., Ky., Inc. v. Williams,* 534 U.S. 184, 201, 151 L.Ed.2d 615, 122 S.Ct. 681 (2002)). Similarly, "discrimination," 42 U.S.C. § 12131, which is not defined in Title II, may take its meaning from Title I. *See Washington v. Ind. High Sch. Athletic Ass'n, 181 F.3d 840, 848 (7th Cir.), cert. denied* 528 U.S. 1046, 145 L.Ed.2d 482, 120 S.Ct. 579 (1999); *Innovative Health Sys., Inc. v. City of White Plains,* 117 F.3d 37, 47 (2d Cir.1997).

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

. . .

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

28 C.F.R. § 35.130(b)(1) (2002). The logical import of the regulations is that the Department has concluded that a public entity is not only prohibited from affording to persons with disabilities services that are "not equal to that afforded others," *id.* § 35.130(b)(1)(ii), or "not as effective in affording equal opportunity," *id.* § 35.130(b)((1)(iii), but also cannot prevent a qualified individual with a disability from enjoying "any aid, benefit, or service," *id.* § 35.130(b)(1)(i), regardless of whether other individuals are granted access. Similarly, the Department's regulations implementing the Rehabilitation Act state that "a recipient *shall* make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 28 C.F.R. § 41.53 (2002) (emphasis added). This mandatory language necessarily implies that the regulation is not conditioned on the ability of the "otherwise qualified . . . applicant" to show that other applicants receive more favorable treatment. The defendants have not challenged the validity, nor directly challenged the reasonableness, of either set of regulations.

We have employed a similar understanding in our cases applying the Rehabilitation Act. That is, our cases speak simply in terms of helping individuals with disabilities access public benefits to which both they and those without disabilities are legally entitled, and to which they would have difficulty obtaining access due to disabilities; the cases do not invite comparisons to the results obtained by individuals without disabilities. We have specifically embraced the view that the Rehabilitation Act requires affirmative accommodations to ensure that facially neutral rules do not in practice discriminate against individuals with disabilities. *See Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir.1982). In language that is much quoted by the District Court and by the parties, we commented that:

> "denial of access cannot be lessened simply by eliminating discriminatory selection criteria; because the barriers to equal participation are physical rather than abstract, some sort of action must be taken to remove them . . . . *It is not enough to open the door for the handicapped . . . ; a ramp must be built so the door can be reached."*

Id. (emphasis added and internal quotations and citations omitted). The *Dopico* court further explained that "where the relief requested did not modify some integral aspect of a defendant's program, courts have ruled that section 504 does require efforts to make the program available to otherwise qualified handicapped persons." *Id.* at 653 n. 6. Similarly, in *Rothschild v. Grottenthaler*, we found that a public school had a duty under § 504 of the Rehabilitation Act reasonably to accommodate deaf parents by providing them with a sign language interpreter at "school-initiated conferences incident to the academic and/or disciplinary aspects of their child's education." 907 F.2d 286, 292–93 (2d Cir.1990) (citation omitted). Without the interpreter, deaf parents would not have meaningful access to the service provided to non-deaf parents. We stated that "" Section 504 of the Rehabilitation Act requires some degree of positive effort to expand the availability of federally funded programs to handicapped persons otherwise qualified to benefit from them. ""*Id.* (quoting *Dopico*, 687

F.2d at 653 n. 6). In short, our measure in both cases was whether the plaintiffs with disabilities could achieve meaningful access, and not whether the access the plaintiffs had (absent a remedy) was less meaningful than what was enjoyed by others.

Other courts have explicitly distinguished claims based on failure reasonably to accommodate from those based on disparate impact. For example, in *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1283 (7th Cir.1996), the Seventh Circuit stated:

> [T]his is not a disparate treatment claim, but a reasonable accommodation claim, and it must be analyzed differently. [Plaintiff] is not complaining that [defendant] treated him differently and less favorably than other, non-disabled employees. He is not comparing his treatment to that of any other . . . employee. His complaint relates solely to [defendant's] failure to reasonably accommodate his disability.

See also *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir.2002) ("In addition to forbidding disparate treatment of those with disabilities, the ADA makes it unlawful for an employer to fail to provide reasonable accommodations."); *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015, 1020 (9th Cir.2002), *cert. denied*, 123 S.Ct. 1583 (2003); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 646 n. 9 (1st Cir.2000) ("[t]he ADA does more than prohibit disparate treatment. It also imposes an affirmative obligation to provide reasonable accommodation to disabled employees."); Dunlap v. Ass'n of Bay Area

Gov'ts, 996 F.Supp. 962, 965 (N.D.Cal.1998) ("A disability discrimination claim may be brought either on the theory that defendant failed to make reasonable accommodations or on a more conventional disparate treatment theory, or both. This is because the ADA not only protects against disparate treatment, it also creates an affirmative duty in some circumstances to provide special, preferred treatment, or 'reasonable accommodation.'").

Our approach also finds support in the Olmstead plurality's opinion. Writing on this point for herself and three other justices, Justice Ginsburg appeared to reject the suggestion that every ADA claim must necessarily include proof of disparate impact:

> Nor were [the plaintiffs] subjected to discrimination, the State contends, because discrimination necessarily requires uneven treatment of similarly situated individuals, and [plaintiffs] had identified no comparison class, *i.e.*, no similarly situated individuals given preferential treatment. We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.

Olmstead, 527 U.S. at 598 (plurality op.) (internal quotations and citation omitted).

We acknowledge, however, that the ADA and Rehabilitation Act are addressed to "rules . . . that hurt [people with disabilities] *by reason of their handicap*, rather than that hurt them solely by virtue of what they have in common with other people." *Good Shephard*

Manor Found., Inc. v. City of Momence, 323 F.3d 557, 561 (7th Cir.2003) (internal quotations and citation omitted). In other words, there must be something different about the way the plaintiff is treated "by reason of . . . disability." 42 U.S.C. § 12132. We have long recognized that the basic analytical framework of the ADA includes such a comparative component. *See, e.g., Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir.1999) (declining to recognize discrimination where plaintiff requested a substantive benefit that was not provided to the non-disabled); *Doe v. Pfrommer*, 148 F.3d 73, 83–84 (2d Cir.1998) ("[t]he central purpose of the ADA and § 504 of the Rehabilitation Act is to assure that disabled individuals receive ' evenhanded treatment' in relation to the able-bodied . . . . [W]hat [plaintiff] ultimately seeks to challenge is not illegal discrimination against the disabled, but the substance of services provided to him."); *Flight v. Gloeckler*, 68 F.3d 61, 63–64 (2d Cir.1995) (per curiam); *See also Olmstead*, 527 U.S. at 600–01 (plurality op.) (holding that the "unjustified institutional isolation of persons with disabilities is a form of discrimination," because of, among other factors, the "[d]issimilar treatment" inherent in the fact that institutionalized isolation requires persons with disabilities to "relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice"); *Id.* at 611–13 (Kennedy, J., concurring) (elaborating on the plurality's notion of "dissimilar treatment").

It does not follow, though, from this framework that a plaintiff must also demonstrate disparate impact in all cases. That other applicants fail for other reasons to obtain meaningful access to a public service does not demonstrate that applicants with disabilities were not the objects of dissimilar treatment because of their disabilities, or that they were not "subject to a more onerous condition," *Olmstead*, 527 U.S. at 612 (Kennedy, J., concurring), than those who did not have disabilities. Further, the statute itself does not literally require a showing of "discrimination." A plaintiff can prevail either by showing "discrimination" or by showing "deni[al of] the benefits" of public services. 42 U.S.C. § 12132.

Therefore, we hold that a claim of discrimination based on a failure reasonably to accommodate is distinct from a claim of discrimination based on disparate impact. Quite simply, the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation.

2.

In addition to arguing that the plaintiffs bear the burden of proving disparate impact in order to show failure reasonably to accommodate, an argument we reject, the defendants contend that they should be permitted to show a lack of disparate impact in order to demonstrate that the plaintiffs have not been denied access *because of their disabilities*. The parties have identified two possible causes of the plaintiffs' low rate of obtaining benefits. The plaintiffs argue that their disabilities create obstacles to access. The District Court has made specific findings that the plaintiffs' disabilities prevent them from accessing public services insofar as the plaintiffs face challenges that make it impossible for them meaningfully to access services absent accommodation, and has further found that the current accommodative measures are unacceptably ineffective. *See Henrietta D. v. Giuliani*, 119 F.Supp.2d 181, 185–87, 209 (E.D.N.Y. 2000). The defendants, by contrast, purport to be able to demonstrate that the plaintiffs are no less successful in gaining access to benefits than the non-disabled. Such a showing would suggest an alternative reason for the plaintiffs' low rate of obtaining benefits: systemic problems that create obstacles to access for everyone.

Before we can address the causation question, though, we must first resolve what is meant by "meaningful access to the benefit that the grantee offers," *Choate*, 469 U.S. at 301. The ADA, again, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. If the "benefit" or "service" is defined as whatever the government entity in actuality delivers to all of its applicants, and the fact of the matter is that notwithstanding some abstract statutory mandate it delivers nothing to anyone, then we need never reach the causation question, because there is no exclusion.

We think, however, that the two statutes plainly define benefits by reference to a plaintiff's facial legal entitlements. Indeed, although the *Choate* Court noted that "Section 504 seeks to assure evenhanded treatment," it held that "[t]he Act does not, however, guarantee the handicapped equal *results* from the provision of state Medicaid, even assuming some measure of equality of health could be constructed." 469 U.S. at 304 (emphasis added). The statute's use of the term "qualified" suggests that we must look not to the administration of the program for which the plaintiff is qualified, but rather its formal legal eligibility requirements. 42 U.S.C. §§ 12131–32. The Justice Department's regulations are consistent with this view. *See* 28 C.F.R. § 35.104 (2002) (defining "[q]ualified individual with a disability" under ADA as one who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity"); *id.* § 41.32(b) (defining "[q]ualified handicapped person" for Rehabilitation Act purposes as "a handicapped person who meets the essential eligibility requirements for the receipt of [the federally-funded] services"). Finally, it would impose an enormous evidentiary burden on plaintiffs to have to demonstrate empirically that other facially eligible individuals are in fact receiving the benefits to which they are entitled. In the absence of any language to the contrary, we doubt that Congress intended to compel plaintiffs to carry that burden (at least initially). *Cf. Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935) (noting that in workers' compensation cases "the likelihood that testimony as to the cause of death would have been more readily available to the employer than to the claimant, justif[ies] a presumption" in favor of the claimant); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir.2003) (concluding that Congress intended prisoner's obligation to exhaust prison remedies before filing suit to be an affirmative defense because, among other reasons, prison official defendants have better access to prison records); Charles Alan Wright & Arthur R. Miller, 5 Federal Practice & Procedure § 1271 (2002) (observing that the Federal Rules of Civil Procedure are designed such that a party will not bear the burden of proof on a particular point of law when the evidence needed is not typically within the party's control).

Turning to the causation question itself, we think that the differing explanations offered by the parties for the plaintiffs' inability to obtain the benefits to which they are facially entitled are not mutually exclusive. Again, the District Court found, and the defendants do not dispute, that the plaintiffs are sharply limited in their ability to "travel[], stand[] in line, attend[] scheduled appointments, complet[e] paper work, and otherwise negotiat[e] medical and social service bureaucracies." *Henrietta D.*, 119 F.Supp.2d at 185. The District Court also found that the existing DASIS accommodative regime is unacceptably dysfunctional, and fails meaningfully to remedy these problems. *Id.* at 209. The defendants instead contend, in essence, that their own bureaucracy is so defective that even healthy applicants cannot "negotiate" it, such that there is no disparate impact on the plaintiffs. Even accepting that contention as true, we could still be faced with a situation where either of the two alleged causes of denial of access would independently deny meaningful access even were the other fixed.

Traditional concepts of causation suggest that under such circumstances, the existence of the "disability cause" alone is enough to sustain the plaintiffs' claims. An ADA plaintiff must demonstrate that a denial of benefits occurs "by reason of . . . disability," 42 U.S.C. § 12132,[29] which essentially means that the plaintiff must prove that the denial is "because of" the disability, Olmstead, 527 U.S. at 601; *Id.* at 611–12 (Kennedy, J., concurring). The defendants' contention, rendered in these terms, is that disability was not the cause of the difficulties experienced by the plaintiffs, because the same ultimate difficulty would have resulted in any case. The common law of torts, however, instructs that the existence of additional factors causing an injury does not necessarily negate the fact that the defendant's wrong is also the legal cause of the injury. *See Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 15 (2d Cir.2000) ("A proximate cause determination does not require a jury to identify the liable party as the sole cause of harm; it only asks that the identified cause be a substantial factor in bringing about the injury.") (citing *AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 215 (2d Cir.2000); *Fane* v. Zim*mer, Inc.*, 927 F.2d 124, 128 (2d Cir.1991); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204 (N.Y. 1983)). In assessing whether one cause among many constitutes proximate cause, courts have engaged in inquiries such as whether a cause is a substantial factor in bringing about the harm, *See, e.g., FDIC v. Bierman*, 2 F.3d 1424, 1434 (7th Cir.1993); *Jefferson Bank v. Progressive Cas. Ins. Co.*, 965 F.2d 1274, 1284 (3d Cir.1992), or whether the cause is "too remotely or insignificantly related to the" harm to be a legal basis for liability, *Port Auth. v. Arcadian Corp.*, 189 F.3d 305, 317–18 (3d Cir.1999) (internal quotations and citation omitted).[8]

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[8] We emphasize that we need not, and do not, hold that suits under the ADA and Rehabilitation Act are governed in all of their particulars by the common law of torts, or that plaintiffs must always show proximate cause in order to establish that they have suffered "by reason of" their disability. We simply borrow the concept of multiple causation to interpret this particular aspect of the statutes

In so interpreting the "by reason of . . . disability" requirement, we are mindful of the fact that Title II seeks principally to ensure that disabilities do not prevent access to public services where the disabilities can reasonably be accommodated. It is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). We are thus reluctant to interpret the "by reason of such disability" language of the ADA and Rehabilitation Act, both remedial statutes, so narrowly that they deprive the plaintiffs of reasonable accommodations to which the plaintiffs clearly would be entitled if the social services system were functioning as intended. *See Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984) (recognizing that Rehabilitation Act has "remedial purpose"); *Castellano v. City of New York*, 142 F.3d 58, 69 (2d Cir.1998) (noting "ADA's broad remedial purpose"); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 861 (1st Cir.1998) (observing that ADA is a remedial statute and so should be construed broadly); *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 722 (2d Cir.1994) ("Because the [Rehabilitation] Act is a remedial statute, it and the regulations promulgated under it are to be construed broadly."), *cert. denied*, 513 U.S. 1147 (1995).

We therefore hold that the District Court did not clearly err in concluding, in effect, that the plaintiffs' disabilities were a substantial cause of their inability to obtain services, or that that inability was not so remotely or insignificantly related to their disabilities as not to be "by reason" of them. The District Court has identified major failures within the existing accommodative regime. This is not a case where the evidence has demonstrated that the plaintiffs are failing to access their full benefits even with the help of a smoothly functioning DASIS, and that those without disabilities are faring no better. Here, DASIS does not function smoothly, and the plaintiffs are unable meaningfully to access benefits. Under these circumstances, where testimonial evidence has made clear that the offered accommodation is highly ineffectual, it is no defense that others are equally unsuccessful in accessing benefits. Moreover, as we noted earlier, the fact that individuals other than the class members have been unable to obtain benefits does not of itself demonstrate that the plaintiffs do not face conditions that are more onerous for them because of their particular disabilities. The absence of disparate impact would not prove that DASIS is effective enough to provide benefits under a state of affairs where the social services system functioned smoothly. Where the District Court has clearly identified disability-related challenges that make access more difficult for the plaintiff class than for those without disabilities, and has found the accommodative scheme to be "broken," we hold that the plaintiffs have demonstrated that their disabilities are a cause of the denial of access to benefits.

Of course, as noted above, there is undoubtedly a comparative element to the reasonable accommodation analysis, and a plaintiff must show that the denial of benefits was "by reason of . . . disability." However, we believe that this element is satisfied by the plaintiffs' demonstration (i) that they are facially entitled to public benefits which are also available to similarly situated persons without disabilities, and (ii) that under a state of affairs where the social services system functioned properly, their disabilities would clearly necessitate a reasonable accommodation in order for them meaningfully to access the benefits (which accommodation they are not currently receiving). As we indicate below, our decision does not preclude the use in some cases of the absence of disparate impact as a basis for a defense that an offered accommodation is in fact working.[9]

B. Whether the Relief Granted Constitutes a Reasonable Accommodation

We now turn to whether the injunctive relief ordered by the District Court constitutes a reasonable accommodation. The injunction at its core orders DASIS to perform its statutory mandate, and imposes some procedural mechanisms designed to effectuate this goal. The plaintiffs' prima facie burden in arguing that the relief they obtained represents a reasonable accommodation is "not a heavy one." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir.1995). We have explained that "[i]t is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits," and that "[o]nce the plaintiff has done this, she has made out a *prima facie* showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant." *Id.* We agree with the District Court that the DASIS law represents an attempt at reasonable accommodation and can properly form a basis for the injunctive relief granted in this case. *See Henrietta D. v. Giuliani*, No. 95 Civ. 0641, 1996 WL

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[9] We do, however, find that such a defense would be unsuccessful here (even if the defendants could demonstrate the absence of any disparate impact) where the District Court has clearly found that the accommodative measures are inadequate and ineffective.

633382, at *9 (E.D.N.Y. Oct. 25, 1996) ("[I]n its most basic, facilitory efforts, DAS is a necessary modification to, and not a fundamental alteration of, the public assistance services that the City provides to all eligible New Yorkers."). The avowed purpose of the DASIS law is to "provide access to [publicly subsidized benefits and services] . . . to every person with clinical/symptomatic HIV illness . . . or with AIDS," N.Y. City Admin. Code § 21-126, and the DASIS law makes clear that "[a]ny eligible person shall receive only those benefits and services for which such person qualifies in accordance with the applicable eligibility standards established pursuant to local, state or federal statute, law, regulation or rule," *Id.* at § 21-128(b). We do not intimate that either the mere fact that the DASIS law was enacted or the fact that it was viewed as "access" legislation *per se* makes it a reasonable accommodation under the relevant federal statutes. We find it to be a *prima facie* reasonable accommodation because we agree with the District Court that its provisions are consistent with its goal of serving as a reasonable accommodation, and it does not appear to impose costs that obviously outweigh its benefits. As the District Court noted, the vast majority of services created by the DASIS law are fundamentally procedural in nature. The law provides for intensive case management, for low client-caseworker ratios, and for imposition of clear deadlines. We thus share the District Court's view that the plaintiffs have established that requiring DASIS to comply with the DASIS law represents appropriate reasonable accommodation relief.

The regulations implementing both the Rehabilitation Act and the ADA give a public entity defendant the opportunity to show that a requested accommodation is unreasonable. The regulations provide that such a defendant need not make the requested accommodation if it "would fundamentally alter the nature of the service, program, or activity ," 28 C.F.R. § 35.130(b)(7), or "impose an undue hardship on the operation of [the] program," 28 C.F.R. § 41.53. Similarly, in outlining the burdens of proof in a reasonable accommodation claim under Title I of the ADA, we have held that a defendant will not be required to adopt an accommodation if it successfully demonstrates that the proposed accommodation is unreasonable, *i.e.*, that it "would cause it to suffer an undue hardship." *Borkowski*, 63 F.3d at 138. The Supreme Court in *Olmstead* noted that:

> the undue hardship inquiry requires not simply an assessment of the cost of the accommodation in relation to the recipient's overall budget, but a case-by-case analysis weighing factors that include: (1) [t]he overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) [t]he type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) [t]he nature and cost of the accommodation needed.

527 U.S. at 606 n. 16 (internal citation and quotation marks omitted).

The defendants in this case have not, however, alleged that the proposed accommodation would cause them or their programs undue hardship. Perhaps that is because, at least at the time this litigation was before the District Court, in the defendants' estimation, the accommodation provided by the DASIS law was not causing such a hardship. We note that if at any time such hardship arises the defendants would undoubtedly have the ability to return to the District Court to seek a modification of its order to reflect that condition.

Instead of challenging the requested accommodations based on the burden of their implementation, the defendants argue that no accommodations are required because the plaintiffs have not demonstrated that they are suffering a negative disparate impact relative to similarly situated persons without disabilities. *See Henrietta D.*, 119 F.Supp.2d at 208 n. 17 ("Defendants provided no evidence that DASIS and its special functions represent[] a fundamental alteration of defendants' service, program, or activity. The reasonableness of the modifications that plaintiffs seek, moreover, is evidenced by the fact that virtually all are modifications that defendants have long purported—but failed—to provide, and that they are now required by local law to provide.").[10] As we have observed, no such demonstration is necessary.

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[10] The only language in the defendants' briefs that touches upon the reasonableness of the accommodation is a brief comment that the preclusion of Patricia Smith's testimony made it difficult for the District Court to assess the degree to which the requested accommodations required deviation from the ordinary administraion of social services. We do not believe that Smith's testimony would have materially affected the analysis of the reasonableness of the accommodation.

Accordingly, we affirm the injunction as a reasonable accommodative measure.

We pause, however, to address two additional issues raised by the defendants in other contexts that might provide bases for challenging the scope of the accommodation ordered by the District Court. First, while the defendants frame their disparate treatment argument as an attack on the need for a reasonable accommodation itself, their point also might support an argument that the plaintiffs already are being reasonably accommodated. There would be no need for injunctive relief if the plaintiffs were already being reasonably accommodated. *See Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 385 (2d Cir.1996) (affirming dismissal of ADA claim because "the accommodations offered by the [defendant] were plainly reasonable."). The defendants' disparate impact argument suggests that had the defendants been able to prove that the plaintiffs are faring no worse in accessing benefits than the non-disabled, they would have proven that the plaintiffs were already being reasonably accommodated.

We reject this argument. A "reasonable accommodation" is one that gives the otherwise qualified plaintiff with disabilities "meaningful access" to the program or services sought. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). That others cannot avail themselves of the services does not make the minimal access provided to the plaintiff "meaningful." As we have held, meaningful access must be defined with reference to the plaintiff's facial entitlement to benefits. In this case, the District Court made specific findings to the effect that qualified plaintiffs cannot obtain benefits without aid, and that the current accommodative regime is dysfunctional. That is sufficient to justify relief. The mere fact that the plaintiffs, in the current apparently broken overall social services system, might not be doing worse than persons without disabilities, does not render the dysfunctional DASIS "reasonable."

Second, the defendants assert that the DASIS law fundamentally represents a grant to the plaintiff class of substantive benefits unavailable to persons without disabilities rather than an attempt to accommodate the plaintiff class's disabilities with respect to public benefits available to all qualifying individuals. While the defendants frame this issue as an attack on the plaintiffs' right to any accommodation, it could merit consideration as a basis for questioning whether the injunctive relief granted is overbroad. Even though the plaintiffs have demonstrated that they are entitled to a reasonable accommodation, an accommodation that served as a grant of special substantive rights would not constitute appropriate relief. *See Doe v. Pfrommer*, 148 F.3d 73, 84 (2d Cir.1998). The DASIS law nominally provides the plaintiffs with certain additional substantive benefits, such as nutritional supplements and transportation allowances. There is language in the District Court's opinion arguably to suggest that the plaintiffs might be able to state a claim to some of these substantive benefits. *See Henrietta D.*, 119 F.Supp.2d at 212 n. 22 (commenting that even the "nutritional supplements and transportation allowances act as reasonable modifications allowing persons with AIDS and HIV access to their benefits, not as benefits additional to those received by the non-disabled public").

In spite of this footnote, we do not construe the injunction of the District Court in fact to order access to any of the additional benefits provided only to the plaintiff class. The overall discussion of the opinion and the language of the injunction make clear that the District Court's holding does not ultimately embrace so broad a theory of accommodation. The District Court recognized that the

> [p]laintiffs have made no claim under the ADA or the [Rehabilitation] Act for additional or better benefits and services than provided to the non-disabled. To the contrary, plaintiffs' ADA and [Rehabilitation] Act claims seek meaningful access to the *very same benefits and services* provided to the non-disabled. Plaintiffs seek, and this Court requires, only the modifications—such as intensive case management and low case manager-to-client ratios—required to ensure meaningful access to the same benefits and services.

Id. at 212; *See also Henrietta D. v. Giuliani*, 81 F.Supp.2d 425, 432 (E.D.N.Y. 2000) ("Plaintiffs do not challenge the amount or adequacy of the benefits available to them; they seek equal and meaningful access to benefits already available to them."). The injunction itself specifically limits the "benefits and services" to which it orders access to "public assistance, Medicaid, Food Stamps, housing, and other benefits and services available to qualifying members of the general public comparable to public assistance and welfare benefits." (emphasis added). [11] This language restricts the injunctive relief to benefits available to both the plaintiffs and the eligible non-disabled.

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[11] We are untroubled by the fact that as a practical matter the reforms in DASIS may serve to enhance access to the

Thus, while we affirm the injunctive relief ordered, we note that we do not read the injunction to require provision of extra substantive benefits unavailable to the non-disabled—including, without limitation, enhanced rental assistance,[12] nutritional supplements, and transportation allowances—nor do we construe it to permit an action based on procedural ineffectiveness if the ineffectiveness relates solely to provision of such "additional" substantive benefits.

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additional substantive benefits such as enhanced rent assistance, nutritional benefits, and transportation assistance, or by the fact that a presentation of evidence may involve reference to these benefits (as did the evidence in the District Court here). It is not realistic in practice entirely to bifurcate the different types of services DASIS provides. We simply hold that the District Court did not find any right under the ADA to access the "additional" benefits, and that an evidentiary presentation that would be unpersuasive in the absence of reference to provision of access to additional benefits should not prevail.

[12] The injunction does order access to "housing." We read this provision, however, simply to order access to the housing benefit available to all qualifying persons, and not to the enhanced assistance provided to the plaintiff class. Indeed, the plaintiffs themselves note that they "assert[] no claim with respect to the substance of their rental assistance."

Finally, we have some concern about the provision of the injunction that requires the defendants to "comply with all legally-mandated time frames for the delivery of benefits and services." Dec. 11, 2001 Order, at 2-3. The DASIS law requires that "[w]here no statute, law, regulation or rule provides a time period within which a benefit or service shall be provided . . . such benefit or service shall be provided no later than twenty business days following submission of all information or documentation required to determine eligibility." N.Y. City Admin. Code § 21-128(c)(2). It is not entirely clear to us that once a plaintiff is accommodated to the point that "all information or documentation required to determine eligibility" has been filed, a further requirement for the agency to act with greater dispatch with respect to that plaintiff than it does with respect to other applicants with other infirmities is an "accommodation" of the plaintiff's disability.[13] The fact that a requirement is in the DASIS law does not alone conclusively determine that it is an accommodation required by federal law. Because the defendants do not challenge the timeliness requirements on this ground, however, we need not and do not decide the issue.

These observations aside, we agree, as set forth above, with the District Court that the overwhelming purpose of DASIS is to provide access to public benefits available to all, and that the plaintiffs have demonstrated, and the defendants have not rebutted, evidence that DASIS 39 offers a reasonable accommodation to the challenges faced by the plaintiff class. Indeed, counsel for the city defendants commented in colloquy in the District Court that "DASIS itself is a reasonable modification of the public assistance programs administered by HRA to all non-DASIS clients." We are thus comfortable affirming the injunction.

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[13] We note, however, that the plaintiffs' disabilities may limit their ability to follow up on their applications or respond to changes in circumstance. Other applicants may be able to investigate and pursue troublesome delays in ways that speed the ultimate disposition of the application.

II. Liability of the State Defendant

The state defendant appeals the District Court's imposition of liability on her, as well as the District Court's imposition of injunctive relief against her. She argues that (i) the District Court erred in finding her vicariously liable for the violations of the city defendants; (ii) even if she is liable, the Eleventh Amendment bars the injunctive relief granted against her; and (iii) Congress did not authorize suits under the ADA and Rehabilitation Act against an individual sued in her official capacity. We disagree.

A. State Defendant Liability

The District Court imposed liability under the ADA and Rehabilitation Act on the state defendant for the failings of the city defendants to make reasonable accommodations. It appeared to base such liability both on the state defendant's failure to supervise properly the city defendants and on an agent-principal theory:

> As this Court has previously ruled, under New York State law, State defendant has a duty to supervise City defendants in the provision of public benefits and services.

> Indeed, in the administration of public assistance funds, the local commissioners act on behalf of and as agents for the State. Hence, if City defendants have violated plaintiffs' rights under the federal disability statutes, then State defendant, as City defendants' principal, and as their supervisor, is also liable.

Henrietta D., 119 F.Supp.2d at 216 (internal citations and quotations omitted).[14]

The state defendant argues that neither the ADA nor the Rehabilitation Act require her to supervise the conduct of subsidiary governmental entities who are more directly delivering social services. In particular, she claims that legislation resting on Congress's power to spend money for the general welfare, *See* U.S. Const., art. I, § 8, cl. 1, can impose obligations on states only when "Congress speak[s] with a clear voice" so that "the States [may] exercise their choice" to accept or decline funds subject to Congress's conditions "knowingly, cognizant of the consequences of their participation," *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981); *See also Garcia v. S. U. N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 114 (2d Cir.2001) (noting that Pennhurst clear statement rule applies to the interpretation of the Rehabilitation Act). Since the ADA is designed to mirror the remedial scheme of the Rehabilitation Act, any Spending-Clause related restriction on the scope of the Rehabilitation Act will be reflected in the ADA, notwithstanding the fact that the ADA is not itself Spending Clause legislation. *See Barnes* v. Gorman, 536 U.S. 181, 189 & n. 3 (2002).

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[14] We ultimately do not address the principal-agent issue because, for the reasons that follow, we hold that the District Court properly held the state defendant liable on a failure-to-supervise theory.

It is true that the Rehabilitation Act on its face does not directly announce that participating states will be subject to supervisory liability. Indeed, the Rehabilitation Act does not directly describe any features of the means by which it is enforced; it does cross-reference, however, the judicially-implied private right of action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000). *See* 29 U.S.C. § 794a(a)(2); *Gorman*, 536 U.S. at 185. Where Congress has explicitly directed the courts to create and administer a private right of action, judicial determination of the rules governing the scope of liability is itself, in effect, a clear statement by Congress. *See Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 290-91 (1993); *Id.* at 302 (Thomas, J., dissenting); *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 96 n. 35 (1981) (observing that federal courts could properly find right to contribution without express congressional authorization where statute provided "an authorization for judicial development of substantive federal law to govern those cases"). Put another way, a State that accepts funds under the Rehabilitation Act does so with the knowledge that the rules for supervisory liability will be subject to judicial determination.[15]

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[15] There are, however, some restrictions on our power to craft common-law rules of liability. At least in "cases defining the scope of conduct for which [federal] funding

In defining the contours of a judicially-administered right of action, "[o]ur task is . . . to infer how the [enacting] Congress would have addressed the issue had the . . . action been included as an express provision." *Musick, Peeler, & Garrett*, 508 U.S. at 294. We begin with the observation that Spending Clause legislation is "much in the nature of a contract," and that its "contractual nature has implications for our construction of the scope of available remedies." *Gorman*, 536 U.S. at 186–87 (internal quotations omitted). Accordingly, absent other evidence of Congress's intent,[16] our initial presumption is that the rules of liability will follow general rules of contract.

The common law of contracts strongly suggests that the state defendant is liable to ensure that localities comply with the Rehabilitation Act in their delivery of federally-

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recipients may be held liable for money damages," it appears that we may presume a state defendant is "on notice" only of "remedies explicitly provided in the relevant legislation' and "those remedies traditionally available in suits for breach of contract." *Gorman, 536 U.S. at 186-87.* Because we conclude below that the state defendant would be liable under black-letter contract law, we need not decide to what extent this limitation should apply where no money damages are sought.

[16] For example, where there is a need for flexible interpretation in the face of changing circumstances, *See Bennett v. Ky. Dep't of Educ.,* 470 U.S. 656, 669, 84 L.Ed.2d 590, 105 S.Ct. 1544 (1985), the presumption may be inappropriate.

funded social services. An "obligor"—that is, one who promises performance in exchange for consideration—" cannot rid itself of a duty merely by making an effective delegation." E. Allan Farnsworth, III Farnsworth on Contracts § 11.10 p. 126 (1998). Thus, once a party has made a promise, it is responsible to the obligee to ensure that performance will be satisfactory, even if the promising party obtains some third party to carry out its promise. *See Gymco Constr. Co. v. Architectural Glass & Windows, Inc.*, 884 F.2d 1362, 1365 (11th Cir.1989); *Manhattan Sav. Bank v. United States*, 557 F.2d 1388, 1391 (Ct. Cl. 1977); *Davidson v. Madison Corp.*, 177 N. E. 393, 394 (N.Y. 1931). Here, in accepting federal funds, New York State has promised that its programs will comply with the mandate of the Rehabilitation Act. *See* 29 U.S.C. § 794; *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986). Therefore, under our contract analogy, New York State is also liable to guarantee that those it delegates to carry out its programs satisfy the terms of its promised performance, including compliance with the Rehabilitation Act.

The Justice Department's interpretation of the Rehabilitation Act strongly supports this view. The regulations define a covered "recipient" to include not only the State, but also any of its "successor[s], assignee[s], or transferee[s]." 28 C.F.R. § 41.3(d) (2002). In explaining its parallel ADA regulation, the Department noted: "All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements." 28 C.F.R. pt. 35, App. A, at 517 (2002).

Furthermore, as other courts have observed, the fact that the Department in its regulations directs its enforcement efforts at the State agency, and not the State's other agents, *See* 28 C.F.R. §§ 42.504, 42.530, suggests that the Department believes the State has supervisory responsibilities. *See Bonner v. Lewis*, 857 F.2d 559, 566 (9th Cir.1988) (citing *Patton v. Dumpson*, 498 F.Supp. 933, 942 (S.D.N.Y. 1980)).

Moreover, a presumption that the State is responsible for guaranteeing that local entities delivering services comply with the Rehabilitation Act is consistent with Congress's practice in other Spending Clause legislation. *See, e.g., United States v. City of Yonkers*, 96 F.3d 600, 620 (2d Cir.1996) ("The [Equal Educational Opportunities Act of 1974] also imposes on states the obligation to enforce the equal-educational-opportunity obligations of local educational agencies."); *Koster v. Perales*, 903 F.2d 131, 136 (2d Cir.1990) ("The Social Security Act requires a state to supervise any plan which the state establishes under the Aid to Families with Dependent Children program (AFDC)."); *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 697 (3d Cir.1981) (holding that state department of education is liable for failure of local school district to comply with what is now the Individuals with Disabilities Education Act). A number of non-Second Circuit cases also seem to take the view that the state's assumption of liability under the Food Stamp and Medicaid Acts renders it liable for violations of those acts by local agencies. *See Robertson v. Jackson*, 972 F.2d 529, 534 (4th Cir.1992) ("A state that chooses to operate its [food stamp] program through local, semi-autonomous social service agencies cannot thereby diminish the obligation to which the state, as a state, has committed itself, namely, compliance with federal requirements governing the provision of the food stamp benefits that are funded by the federal government."); *Reynolds v. Giuliani*, 118 F.Supp.2d 352, 386 (S.D.N.Y. 44 2000) (quoting *Robertson* and applying its principle to support supervisory liable under the Medicaid Act); *Thomasel v. Perales*, 585 N.E.2d 359, 363 (N.Y. 1991) (imposing attorneys fees award on state agency even though misdeeds occurred at local level because "the AFDC administrative scheme creates an interconnected and inextricable chain of authority, with ultimate power reposed in the [State Department of Social Services ("DSS")] . The State, under Federal and State law, has the duty to supervise AFDC plans and is authorized to sanction local districts for failure to comply with State DSS rules. Local social service commissioners act on behalf of and as agents for the State. Each is a part of and the local arm of the single State administrative agency." (internal quotations and citations omitted));[17] *See*

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[17] A passage in the legislative history of the Food Stamp Act (quoted by several of the above cases) also supports this reasoning:

> In essence, state welfare agencies are responsible for the day-to-day administration of the food stamp program (under Federal Rules) and a substantial portion of their administrative costs. In a number of states, these responsibilities are passed down to local welfare agencies because of the structure of the state's welfare system. The state, however, remains ultimately responsible and is the

also Tormos v. Hammons, 687 N.Y.S.2d 336, 337 (App. Div. 1999) ("Under the Federal and State statutory schemes, State social service agencies have complete supervisory authority over the local departments. . . . [T]he ultimate power and responsibility in this administrative scheme lies with State DSS" (internal citations omitted)). We therefore conclude that Congress's intent would best be effectuated by imposing supervisory liability on the state defendant. We note that the state defendant contends only that 45 she has no obligation to supervise the city. As a result, we need not determine what factual showing would adequately establish an actionable failure to supervise, or whether the District Court clearly erred in finding any such showing was supported by the record below. In addition, because our reasoning depends upon the function of the State in the scheme of the Rehabilitation Act, we have no occasion to decide whether the Rehabilitation Act (and therefore the ADA) imposes similar supervisory duties on state officers sued in their individual capacities, *See Grune v. Rodriguez*, 176 F.3d 27, 34 (2d Cir.1999) (reserving the question), or other non-state individuals or entities.

B. Whether the State Defendant May Be Sued in Her Official Capacity Under the ADA and Rehabilitation Act

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> unit with which the [United States Department of Agriculture] deals.

H. R. Rep. No. 95-464, at 299 (1977), *reprinted in* 1977 U.S. C.C.A.N. 1971, 2235.

The state defendant additionally argues that the Eleventh Amendment bars the injunctive relief granted against her by the District Court. The Eleventh Amendment, however, does not preclude suits against state officers in their official capacity for prospective injunctive relief to prevent a continuing violation of federal law. *See Ex parte Young*, 209 U.S. 123, 155–56 (1908); *See also Green v. Mansour*, 474 U.S. 64, 68 (1985). Obviously, Commissioner Glass is not herself the State; she is a state officer sued here in her official capacity. Accordingly, we respectfully cannot accept her argument.

We also cannot embrace the state defendant's statutory claim that an individual sued in his or her official capacity under the doctrine of *Ex parte Young* is not a "public entity" subject to liability under the ADA, 42 U.S.C. § 12132. The real party in interest in an official-capacity suit is the government entity. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). As a result, it is irrelevant whether the ADA would impose individual liability on the officer sued; since the suit is in effect against the "public entity," it falls within the express authorization of the ADA. *See Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 912–13 (7th Cir.2003); *Carten v. Kent State Univ.*, 282 F.3d 391, 396–97 (6th Cir.2002) (stating that state officials "*are* public entities insofar as they represent the state when acting in their official capacity "); *Grey v. Wilburn*, 270 F.3d 607, 609 (8th Cir.2001); *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1233 (10th Cir.2001); *Randolph v. Rodgers*, 253 F.3d 342, 348 (8th Cir.2001); *Armstrong v. Wilson*, 124 F.3d 1019, 1025–26 (9th Cir.1997), *cert. denied*, 524 U.S. 937 (1998); *cf. Koslow v. Pennsylvania*, 302 F.3d 161, 178–79 (3d Cir.2002) ("[F]ederal ADA claims for prospective injunctive relief against state officials are authorized by the

Ex parte Young doctrine."), *cert. denied*, 123 S.Ct. 1353 (2003). The sole Court of Appeals decision cited to the contrary by the state defendant, *Walker v. Snyder*, 213 F.3d 344 (7th Cir.2000), *cert. denied*, 531 U.S. 1190 (2001), was abrogated by *Bruggeman*, 324 F.3d at 912.

This holding is consistent with our decision in *Garcia v. S. U. N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98 (2d Cir.2001). In *Garcia*, we held that a private suit brought pursuant to Title II of the ADA for *money damages* can only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability. *Id.* at 111–12. However, we specifically noted, citing *Ex parte Young*, that "actions by private individuals for injunctive relief for state violations of Title II have not been foreclosed by today's decision." *Id.* at 115. We observed that while the Supreme Court, in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), had held that suits in federal court by state employees to recover money damages against the State under Title I of the ADA are barred by the Eleventh Amendment, the *Garrett* Court had stated in a footnote that

> [o]ur holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, *as well as by*

> *private individuals in actions for injunctive relief under Ex parte Young.*

Garrett, 531 U.S. at 374 (emphasis added). This footnote, albeit dicta and although specifically addressing Title I, reflects that the *Ex parte Young* exception to the Eleventh Amendment bar to suit is viable under the ADA. *See Bruggeman*, 324 F.3d at 913; Carten, 282 F.3d at 397.

One other issue with respect to the Eleventh Amendment bears some discussion. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-75 (1996), the Court held that Congress may foreclose private enforcement of federal legislation through suits under *Ex parte Young.* While the state defendant's brief is not entirely clear on this point, it is possible to construe the state defendant's position, as does the *amicus curiae* United States, as an argument under *Seminole Tribe* that Congress only intended States, and not their public officials, to be named as defendants. However, in the absence of express direction from Congress, we will not find that reliance on *Ex parte Young* has been foreclosed when the alternative scheme for enforcing the pertinent federal provisions is not so "detailed" that we must infer that Congress could not have intended private enforcement. *Id.* at 74.

In our view, *Seminole Tribe* does not bar *Ex parte Young* relief under Title II against a state official in her official capacity. Neither § 504 nor Title II displays any intent by Congress to bar a suit against state officials in their official capacities for injunctive relief, nor does either create a remedial scheme so elaborate that it could be thought to preclude relief under *Ex parte Young. See Koslow*, 302 F.3d at 179 (citing *Gibson v. Ark. Dep't of*

Corr., 265 F.3d 718, 720–22 (8th Cir.2001)); cf. *Verizon Md., Inc. v. Public Serv. Comm. of Md.*, 535 U.S. 635, 647–48 (2002) (finding *Ex parte Young* available against state officials under Telecommunications Act of 1996, even though act imposed duties on state commission reviewable in federal courts, because "[t]he mere fact that Congress has authorized federal courts to review whether the Commission's action" complies with federal law does not indicate "whom the suit is to be brought against –the state commission, the individual commissioners, or the carriers benefitting from the state commission's order."). Indeed, the United States correctly points out in its *amicus* brief that in enacting § 504 and Title II, Congress did not limit the availability of equitable remedies, but rather, expressly incorporated the remedies of Title VI of the Civil Rights Act of 1964, which include a judicially recognized implied private right of action. *See* 42 U.S.C. § 12133; 29 U.S.C. § 794a; *Garcia,* 280 F.3d at 110–11.[18] We thus agree with the plaintiffs, the United States, and our fellow Courts of Appeals that there is no basis for holding that the ADA or Rehabilitation Act intended to create the kind of comprehensive enforcement scheme that would preclude prospective injunctive relief against a state official in her official capacity.

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[18] The United States also observes that the legislative history of Title II supports the argument that Congress intended injunctive relief be available. The legislative history indicates that Congress intended the "full panoply of remedies" to be available, H.R. Rep. No. 485, pt. 2, at 98 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 381; H.R. Rep. No. 485, pt. 3, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 475, and the House Judiciary Committee Report cited as an example of the remedies available under Title II, the Eight Circuit's decision in *Miener v. Missouri,* 673 F.2d 969 (8th Cir.1982), which held that an implied private right of action for damages and injunctive relief was available under § 504 where officials were sued in their official capacities, H.R. Rep. No. 485,

The state defendant's remaining arguments can be resolved more readily. We first do not accept the state defendant's claim that, to the extent that we have drawn on state law to ascribe liability to the state defendant, we have improperly "grant[ed] injunctive relief against a state official *on the basis of state law.*" *Fleet Bank, Nat'l Ass'n v. Burke*, 160 F.3d 883, 891 (2d Cir.1998) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)), *cert. denied*, 527 U.S. 1004 (1999). *Pennhurst II* does not bar federal relief simply because the determination of federal law also involves some antecedent state-law question, or, a fortiori, merely incorporates state-law principles. *Fleet Bank*, 160 F.3d at 891 n. 6; *Catone v. Spielmann*, 149 F.3d 156, 160 n. 1 (2d Cir.1998); *Mont v. Heintz*, 849 F.2d 704, 709–10 (2d Cir.1988); *Geis v. Bd. of Educ. of Parsippany-Troy Hills*, 774 F.2d 575, 581 (3d Cir.1985). In the case at hand, the District Court's reference to state law responsibilities served merely to aid resolution of the ultimate question of whether the state defendant is complying with its responsibilities under federal law. Nor does the Tenth Amendment offer any bar to the conditions placed on this grant of federal funds. *See*

Pt. 3, at 52 n.62, *reprinted in* 1990 U.S.C.C.A.N. at 475 n.62.

South Dakota v. Dole, 483 U.S. 203, 210 (1987). Finally, we disagree with the state defendant's argument that the plaintiffs lack standing. The plaintiffs have demonstrated that the state defendant had a duty to supervise the city defendants, and therefore have demonstrated that their injuries are fairly traceable to the state defendant.

Thus, we do not agree with the state defendant's argument that the Eleventh Amendment required the dismissal of the claims against the state defendant, and we affirm her liability under the ADA and Rehabilitation Act.

III. Appropriateness of the Equitable Relief

The city defendants next argue that the District Court abused its discretion by granting declaratory and injunctive relief, contending that the plaintiffs did not demonstrate the likelihood of any future government action in violation of law or their rights sufficient to warrant such relief. A plaintiff seeking injunctive relief bears the burden of demonstrating it will suffer "real and imminent, not remote, irreparable harm" in the absence of a remedy. *Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir.1992) (internal quotation omitted). "In general, a district court has broad discretion to enjoin possible future violations of law where past violations have been shown . . . . Courts are free to assume that past misconduct is highly suggestive of the likelihood of future violations." *United States v. Carson*, 52 F.3d 1173, 1183–84 (2d Cir.1995) (internal quotations and citations omitted), *cert. denied*, 516 U.S. 1122 (1996). We will uphold a district court's decision to award injunctive relief unless the court abused its discretion. *Fair Housing in Huntington Comm., Inc. v. Town of Huntington*, 316 F.3d 357, 364–65 (2d Cir.2003); *See* Fed.R Civ. P. 52(a).

We believe that the District Court's factual findings provide ample support for its grant of declaratory and injunctive relief. The District Court found a situation where DASIS did not fulfill its legal mandate. While the defendants argue that the witnesses testified about past harms and did not address potential future violations, they ignore the fact that a senior DASIS official acknowledged continued non-compliance with the DASIS law, and the fact that the District Court's statistical analysis relied largely on the most recent DASIS reports. The District Court did not abuse its discretion in concluding that these data supported an inference that there were likely to be violations of a similar nature in the future.

IV. Other Claims

The city defendants also challenge the District Court's decision to exercise pendent jurisdiction over the various state law claims because, they argue, the federal claims were meritless and it was therefore unnecessary for the District Court to entertain the state claims. The city defendants do not address the merits of any of the plaintiffs' state law claims. Because, for the reasons stated above, we believe that the District Court properly ruled in the plaintiffs' favor on the ADA and Rehabilitation Act claims, we hold that it properly exercised pendent jurisdiction over the state claims given that the underlying factual issues were identical, and efficiency was therefore obviously served by simultaneous adjudication of the state law issues. *See Promisel v. First Am. Artificial Flowers, Inc.*, 943 F.2d 251, 254 (2d Cir.1991) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)), *cert. denied*, 502 U.S. 1060 (1992). Because we reject the city defendants' challenge to the District Court's assumption of pendent jurisdiction and because the city defendants do not challenge the state law liability on any other basis, we affirm the District Court's finding of liability against the city defendants on the various state law claims.

Finally, because we can affirm the injunction entirely based on the ADA and Rehabilitation Act violations, we need not decide the question of whether a private right of action exists under Medicaid, 42 U.S.C. §§ 1396a(a)(8), a(19), as the plaintiffs alleged.

Conclusion

For the reasons stated above, we hold that: (1) a plaintiff advancing a reasonable accommodation claim under the ADA or Rehabilitation Act need not also show that the challenged program or practice has a disparate impact on persons with disabilities; (2) a plaintiff with disabilities suing under the ADA or Rehabilitation Act may show that he or she has been excluded from or denied the benefits of a public entity's services or programs "by reason of such disability" even if there are other contributory causes for the exclusion or denial, as long as the plaintiff can show that the disability was a substantial cause of the exclusion or denial; (3) injunctive relief to remedy a violation of the ADA or Rehabilitation Act is appropriate if it provides the injured plaintiff with "meaningful access" to the programs or services to which the plaintiff is facially entitled; (4) the injunction in this case did not provide the plaintiffs with substantive benefits above and beyond those facially available to all qualifying individuals; (5) the ADA and the Rehabilitation Act make States liable for the failure of their delegates to comply with the requirements of the Acts; (6) a state official sued in his or her official capacity is a "public entity" subject to liability under the ADA; and (7) in enacting the ADA and Rehabilitation Act, Congress did not intend to foreclose private remedies under the doctrine of *Ex parte Young*. Therefore, we affirm the District Court decision in its entirety, except that we decline to address the plaintiffs' Medicaid Act claim and instead rest our affirmance of the injunction on the ADA and Rehabilitation Act claims. We also note that, while defendants have not up until this time argued that compliance with the District Court's Order represents an undue hardship, if at any time such hardship arises the defendants would undoubtedly have the ability to return to the District Court to seek a modification of its Order.

HENRIETTA D., et al., Plaintiffs, - against - RUDOLPH GIULIANI, et al., Defendants.

95 CV 641 (SJ)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS *21834*

December 11, 2001, Decided
December 19, 2001, Filed

COUNSEL: For HENRIETTA D., NIDIA S., SIMONE A., EZZARD S., JOHN R., PEDRO R., plaintiffs: Lauren Shapiro, Cynthia Schneider, Brooklyn Legal Services Corp. B, Brooklyn, NY.

For HENRIETTA D., NIDIA S., SIMONE A., EZZARD S., JOHN R., PEDRO R., plaintiffs: John C. Gray, Jr.

For HENRIETTA D., NIDIA S., SIMONE A., EZZARD S., JOHN R., PEDRO R., plaintiffs: Susan J. Kohlmann, Armen H. Merjian, Karen B. Dine, Pillsbury Winthrop, LLP, Theresa M. McGovern, Ricardo A. Castro, HIV Law Project, Michael Kink, Virginia G. Shubert, Housing Works, Inc., New York, NY.

For RUDOLPH GIULIANI, defendant: Lisa M. Brauner, Corporation Counsel of the City of New York, New York, NY.

For MARVA HAMMONS, MARY E. GLASS, defendants: Clinton F. Jr. Eubanks, Jr., Schwartz,Klink,Schreiber,P.C., N.Y., NY.

For MARVA HAMMONS, defendant: Michele Lerner, Corporation Counsel of the City of New York, New York, NY.

For MARY E. GLASS, defendant: Anne H. Bomser, Esq., Attorney General, State of New York, Dennis C. Vacco, New York, NY.

JUDGES: HON. STERLING JOHNSON, U.S. DISTRICT JUDGE.

OPINION BY: STERLING JOHNSON

OPINION:

PROPOSED ORDER

This action having been tried without a jury before the Honorable Sterling Johnson, Jr., United States District Judge, on May 1, 2000, May 2, 2000, June 20, 2000, June 21, 2000, and June 22, 2000; and this Court having heard the testimony of witnesses and having considered the documents received in evidence:

NOW, THEREFORE, this Court does hereby set forth its final judgment and order (hereinafter "Order"):

REMEDIES

In accordance with the Findings of Fact and Conclusions of Law filed September 18, 2000, it is this 11th day of Dec., 2001:

ORDERED, ADJUDGED, AND DECLARED as follows:

Pursuant to 28 U.S.C. §§ 2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure, this Court declares that City Defendants[1] have violated Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* and its implementing regulations; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and its implementing regulations; 42 U.S.C. §§ 1396a(a)(8), (a)(19), 42 C.F.R. §§ 435.911(a) and (b), and 7 C.F.R. § 273.2, and 45 C.F.R. § 206.10(a)(i); New York State Social Services Law and implementing regulations and administrative directives; the Due Process Clause of the New York State and United States Constitutions; and Article XVII, Sections 1 and 3 of the New York State Constitution.

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[1] The City defendants include Rudolph Guiliani, Mayor of the City of New York, Marva Hammons, Administrator of the New York City Human Resources Administration and Commissioner of the New York City Department of Social Services (the "City defendants").

Pursuant to 28 U.S.C. §§ 2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure, this Court declares that the State Defendant[2] has violated Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* and its implementing regulations and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and its implementing regulations;

WHEREFORE, CITY DEFENDANTS ARE HEREBY ORDERED AS FOLLOWS:

1. The City of New York, through the Division of AIDS Services and Income Support ("DASIS") or its functional or legal equivalent, shall (a) provide access to public benefits and services to every person with clinical/symptomatic HIV illness or with AIDS who requests assistance and (b) ensure the provision of public benefits and services to eligible persons with clinical/symptomatic HIV illness or with AIDS, and (c) comply with all legally-mandated time frames for the delivery of benefits and services. Benefits and services include public assistance, Medicaid, Food Stamps, housing, and other benefits and services available to qualifying members of the general public comparable to public assistance and welfare benefits. Benefits and services shall also include Social Security benefits for purposes of subparagraph (a) but not subparagraphs (b) or (c). The use of the term DASIS in this Order is without prejudice to City Defendants' use of a functional and legal equivalent of DASIS with which it may fulfill its obligations.

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[2] The State Defendant refers to the Commissioner of the New York State Department of Social Services.

2. DASIS shall provide eligible persons with clinical/symptomatic HIV illness or with AIDS with intensive case management, with an average ratio at each field office of DASIS that shall not exceed one caseworker or supervisor to 25 family cases, and with an overall average ratio for all cases at each field office of DASIS that shall not exceed one caseworker or supervisor to 34 cases. Defendants shall hire, train, and employ sufficient caseworkers and supervisors to achieve these mandated ratios.

3. Upon written or oral application to DASIS for benefits and services or upon submission of documents required to establish eligibility for benefits and services by a person with clinical/symptomatic HIV illness or with AIDS, staff of DASIS shall, on each such occasion, immediately provide such person or such person's representative with a receipt that shall include, but not be limited to, the date of the request or submission of information, a description of the request made or information received, and a statement as to whether the application for such benefits and services is complete or incomplete. If the application is incomplete, the receipt shall identify any and all information or documents needed in order for the application to be deemed complete.

4. City Defendants shall meet the following requirements for a period of three years from the date of this Order, unless an appellate court orders otherwise:

> a. City Defendants shall appoint a representative to handle all problems that DASIS clients are experiencing as reported by Plaintiffs' counsel or their representative "Troubleshooter." (This shall

exclude problems in obtaining same-day placement in emergency housing and problems with the physical conditions in the emergency housing utilized by DASIS.) City Defendants' representative shall facilitate resolution of all outstanding problems by working with individuals authorized to expedite resolution of such problems and shall communicate with Plaintiffs' counsel or their representative in resolving these problems. The Troubleshooter shall likewise work with the Fair Hearing and Appeal Unit ("FHAU") of DASIS in resolving these problems.

b. With any DASIS acceptance letter or materials, and with every recertification notice, City Defendants shall mail a notice to all DASIS clients informing them of their rights under the Henrietta D. judgment, in English, Spanish, and Haitian Creole, and in the manner agreed upon by the parties (see Appendix A). In addition, City Defendants shall prominently display this notice, at all DASIS centers. The notice attached as Appendix A may be modified on consent of the Plaintiffs' counsel and as approved by the Court.

c. Plaintiffs' counsel or their representatives shall be permitted to conduct on-site inspections of DASIS centers to monitor DASIS' compliance with the law. No more than three Plaintiffs' counsel or representatives may be present at any inspection, and no more than two Defendants' counsel or representatives may be present at any inspection. Plaintiffs shall provide Defendants' counsel with two business days' notice of such inspections.

Defendants' counsel shall not reveal this information regarding proposed inspections to anyone, with the exception of co-counsel. Plaintiffs' counsel shall not reveal this information regarding proposed inspections to anyone, with the exception of co-counsel and the representative(s) who will attend the inspections. Defendants' counsel or their representative shall be permitted to accompany Plaintiffs' counsel during such inspections to announce the presence of Plaintiffs' counsel and to observe. In addition, Defendants' counsel or their representative shall not initiate communication with DASIS clients or their representatives. If a DASIS client or his or her representative initiates a communication with Defendants' counsel or representative, Defendants' counsel or representative shall direct him or her to Plaintiffs' counsel or representative. In addition, Plaintiffs' counsel shall be permitted to set up a table, space permitting, with a conspicuous banner bearing the title "TROUBLESHOOTER," and to explain their presence and purpose through written material approved by the Court. Plaintiffs' counsel or their representatives shall not approach HRA staff, DASIS clients or their representatives, but they shall be permitted freely to talk with any such individuals who approach them. If clients have outstanding problems with or complaints about DASIS, Plaintiffs' counsel or their representatives shall complete a Troubleshooter complaint form on the client's behalf, to be submitted to the Troubleshooter after the visit is completed. During the first six months of inspections, Plaintiffs shall be permitted to conduct inspections at every DASIS Field Office, no more frequently than three inspections per month, plus any re-visits to centers already inspected upon agreement of the parties or for good cause shown. After the first six months of inspections, Plaintiffs shall limit their inspections to no more than two inspections per month, unless good cause is shown to the Court to permit additional inspections.

d. Upon application by City Defendants' counsel, the Court may, for good cause shown, convert the time frames for any or all of the reporting requirements set forth in Appendix B from monthly to quarterly.

e. City Defendants shall comply with the reporting requirements set forth in Appendix B below.

WHEREFORE, THE STATE DEFENDANT IS HEREBY ORDERED AS FOLLOWS:

1. State Defendant shall supervise City Defendants' provision of benefits and services in accordance with Paragraph 1 of this Order.

2. State Defendant shall timely issue decisions after Fair Hearings within 60 days from the date of a request for a Fair Hearing by a DASIS client, exclusive of any adjournment of the Fair Hearing.

3. Where a decision after Fair Hearing has not been issued within the time period set forth in Paragraph 7 above, the State Defendant shall monitor and use its best

efforts to ensure that the decision after Fair Hearing is issued as promptly as possible and to facilitate compliance by City Defendants within 90 days from the date of the request for the Fair Hearing and within 30 days from the date of the decision after Fair Hearing, exclusive of any adjournment of the Fair Hearing.

4. State Defendant shall meet the following requirements for a period of three years from the date of this Order, unless an appellate court orders others otherwise:

> a. State Defendant shall appoint a representative to handle problems that DASIS clients are experiencing relating to Fair Hearings as reported by Plaintiffs' counsel or their representative "Troubleshooter."
>
> b. State Defendant shall provide on a monthly basis a report of all decisions after Fair Hearings affecting DASIS clients issued after requests for Fair Hearings. The report shall contain at a minimum: identification of the DASIS client (by a means that will preserve her or his confidentiality); date of Fair Hearing request(s); date of Fair Hearing; date of issuance of the decision after Fair Hearing; and the number of days less adjournments from the date of request to the date of issuance of all such decisions after Fair Hearing.

IN ORDER TO ENSURE COMPLIANCE WITH THE ABOVE ORDER, IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that:

5. This Court retains full jurisdiction over compliance with this Order.

6. This Court shall appoint the Honorable Cheryl L. Pollak, United States Magistrate Judge (the "Magistrate"), who shall monitor compliance with the terms of this Order for a period of three years from the date of this Order. The Magistrate shall have the power to compel compliance with the requirements of this Order, to impose penalties and sanctions in the event of noncompliance, and to create and implement procedures to assist in monitoring and compulsion. Such power shall include, but shall not be limited to, the ability to order the generation and submission of additional monitoring reports, to appoint such persons as the Magistrate may deem necessary to assist her in monitoring, compliance, and such other procedures as the Magistrate deems just and necessary. Additionally, the Magistrate shall be charged with the duty to ensure that all current and new DASIS clients are properly notified of their rights pursuant to this Order.

7. Any dispute arising under this Order shall be determined in the first instance by the Magistrate. Any party shall have the right to request a conference with the Magistrate if a party believes that a problem or issue cannot be resolved by the parties. Disputes not resolved by the Magistrate may be submitted to the District Court.

Dated: New York, New York
Dec. 11, 2001

So Ordered.

HON. STERLING JOHNSON

U.S. DISTRICT JUDGE

APPENDIX A

IMPORTANT NOTICE REGARDING YOUR RIGHTS TO DASIS BENEFITS AND SERVICES

Under a recent Federal Court decision, *Henrietta D. v. Giuliani*, a new procedure has been established to help solve individual problems with DASIS benefits and services.

Under Federal, State and local laws, DASIS is responsible in New York City for making sure that eligible persons living with HIV/AIDS and their families have access to benefits and services. These include intensive case management, financial assistance, Medicaid, home care, homemaking, food stamps, and housing, including rental assistance.

Federal, State and local laws also set time frames and other standards for DASIS benefits and services. For example:

. DASIS must give you a written receipt every time you request benefits or services, and every time you give documents to DASIS;

. You are entitled to prior written notice of any change in your benefits, or that your case will be closed, telling you when and why this will happen; and

. There are set time limits for DASIS to make decisions on requests for benefits like rental assistance, and to issue approved benefits.

If you have ANY problem with DASIS benefits and services that you cannot resolve on your own, you can call the following Troubleshooter to see if they can help you by using the problem solving procedure set up as the result of Henrietta D. v. Giuliani:

Troubleshooter

Housing Works, Inc.

Phone: 212-645-8111 x. 187

Fax: 212-989-8660

AVISO IMPORTANTE SOBRE SUS DERECHOS A BENEFICIOS Y SERVICIOS DE DASIS

Bajo una reciente decision de la corte federal en el caso, *Henrietta D. v. Guiliani*, se ha establecido un nuevo procedimiento para ayudar en resolver los problemas individuales con los servicios y beneficios de DASIS.

Bajo las leyes federales, estatales, y locales, en la cuidad de Nueva York DASIS tiene la responsabilidad de asegurar que las personas viviendo con VIH/SIDA y sus familias tienen acceso a los beneficios y servicios. Estos servicios incluyen el manejo de casos, asistencia financiera, Medicaid, servicios del cuidado del hogar, cupones de alimento, asistencia con el pago de arriendo y ayuda con viviendas.

Las leyes federales, estatales, y locales tambien tienen ciertos plazos y rautas de calidad para los servicios y beneficios de DASIS. Por ejemplo:

. DASIS tiene que darle a Usted un recibo cada vez que Usted pide servicios o beneficios; y cada vez que Usted le entrega documentos a DASIS.

. Usted tiene el derecho de recibir por escrito notificacion de cualquier propuesto cambio a sus beneficios; o, si van a cerrar su caso, una explicacion porque y cuando esto va a pasar.

. Hay ciertos plazos que DASIS tiene para tomar decisiones en las solicitudes para beneficios como la asistencia de arriendo y para entregar los beneficios que han sido aprobados.

Si Usted tiene CUALQUIER problema con sus beneficios o servicios de DASIS que Usted no puede resolver por si mismo, Usted puede llamar al "Troubleshooters" para ver si el o ella puede ayudar por el uso del procedimiento establecido en caso Henrietta D. v. Guiliani.

Troubleshooter

Housing Works, Inc.

Phone: 212-645-8111 x. 187

Fax: 212-989-8660

NOUVEL ENPOTAN KONCENAN DWA'W SOU BENEFIS ET SEVIS DASIS

Tou denyeman, akoz decizyon Federal nan ka *Henrietta D. kont Giuliani*, yo pran gnou mezi pou rezoud pwoblem nan sevis e benefis DASIS yo.

Lwa Federal, provins e local di ke DASIS gin responsablite nan NouYok pou veye ke moun ki soufri ak SIDA ou byen ki gen viris HIV nan san yo. Yo min'm ak fanmi yo dwe recevwa tout sevis e benefis ke yo merite yon fwa ke yo kalifye. Sa vle di, ke yo dwe recevwa, lajan, swen medikal, food stamps e tout lot assistans social ke yo bezwen.

Lwa Federal, Provins e Local yo reglemante tan, avek kondityon tout benefis e sevis DASIS yo, pa ekzanp:

. DASIS dwe ba'w gnou reci chak fwa ke'w mande'l ou byen, chak fwa ke li ba'w sevis, e chak fwa tou ke'w bay DASIS dokiman.

. DASIS dwe fe'w kon nin pa ekri avan ke'l fe ninpot chanjeman nan sevis ou benefis ke'w recewva. Li dwe di'w avan li femen Case pa'w la, e pouki sa lap femen'l.

. DASIS gin gnou vale tan byen regle ke'l dwe pran yon desizyon sou demande pou assistans lojeman e demande pou sevis ki deja aprouve.

KELKE SWA pwoblem ou ginyin avek DASIS, ke'w pakapab rezoud ou min'm, ou kapab rele Troubleshooter pou konin si nou kabap utilize nouvo mezi ki pran akoz de decizyon ka Henrietta D. kont Giuliani:

Troubleshooter

Housing Works, Inc.

Phone: 212-645-8111 x. 187

Fax: 212-989-8660

APPENDIX B

REPORTING REQUIREMENTS FOR CITY DEFENDANTS PURSUANT TO HENRIETTA D. v. GIULIANI

City defendants shall provide the DASIS Quarterly Performance Reports to Plaintiffs' counsel and the Court.

In addition, City Defendants shall report all of the following information to Plaintiffs' counsel and to the Court on a monthly basis:

A. For each and every benefit or service provided by or through each and every DASIS Center on a case-by-case basis (i.e., what DASIS labels "CBCFA"), City Defendants shall track the number of days from a request for any benefit or service to the date of completed application; the number of days from completed application to approval and/or denial of that application, and the number of days from approval to the provision of such benefit and/or service. Completed application date in all instances herein shall, until the July 2001 Report, mean the date that the case manager signs off on the application as completed. Beginning with the July 2001 Report, completed application date shall mean the date on the client's receipt indicating that the application is complete.

B. With respect to Food Stamps, Medicaid, and Public Assistance Benefits, City Defendants shall, for each and every such benefit or service provided by or through each and every DASIS Center, track the number of days from application date to the date of approval or denial of that application, and the number of days from approval to non-provision of such benefit and/or service on a non-emergency basis. City Defendants shall disaggregate family cases and individual cases. For the sake of clarity, City Defendants shall not utilize the current criteria of applications "accepted within 25 working days" or "within more than 25 working days." In addition, with respect to new applicants, City Defendants shall track the number of days from first contact with DASIS through the Serviceline to the provision of the first benefits to the new DASIS client.

C. (1) For each and every DASIS Center, City Defendants shall track the number of days from the application date to the first date of issuance of an immediate needs grant (i.e., an emergency grant of Food Stamps or cash assistance). Application date shall mean the date that the client signs the application.

(2) Beginning with the July 2001 Report, for applications for emergency benefits when a client is homeless or facing eviction, processed through what DASIS labels "CBCFA," City Defendants shall track the number of days from a request for any such benefit to the date of completed application; the number of days from completed application to approval and/or denial of that

application, and the number of days from approval to the provision of such benefit, disaggregated by DASIS Center.

D. Plaintiffs' counsel shall have the right to request and receive the back-up information or documentation, on disk and in hardcopy form, which supports City Defendants' performance data for benefits or services processed on a case-by-case basis (i.e., what DASIS labels "CBCFA"), at reasonable intervals, but not more frequently than once every three months.

E. For each and every DASIS Center, City Defendants shall report the average length of time from requests for supportive housing placements to placement.

F. For each and every DASIS Center, City Defendants shall report the number of Public Assistance cases closed; the reasons for such closure; the number of such cases that were reopened; and the average length of time required to reopen such closed cases.

G. For each and every DASIS Center, City Defendants shall report the number and percentages of cases in which DASIS takes under 30 days and the number and percentage of cases in which DASIS takes over 30 days to comply with fair hearing decisions in favor of applicants and recipients, excepting appeals brought by Medicaid-only clients processed through HRA's MAP.

H. For each and every DASIS Center, City Defendants shall report the number of eligibility specialists and the ratio of eligibility specialists to overall cases.

I. For each and every DASIS Center, City Defendants shall report the ratio of case managers and supervisors to cases, disaggregated by the ratio of case managers and supervisors to family cases and the ratio of case managers and supervisors to overall cases.

J. DASIS shall provide Plaintiffs' counsel with at least two weeks' notice of any change in policy that affects DASIS client services or benefits, unless good cause can be shown why two weeks' notice under the circumstances is not practicable. The notice shall provide Plaintiffs' counsel with full details of the proposed change in order to permit Plaintiffs' counsel to review and, where appropriate, to object to the proposed change.

LEX*SEE* 119 FSUPP 2D 181

HENRIETTA D., NIDIA S., SIMONE A., EZZARD S., JOHN R., and PEDRO R., on behalf of themselves and others similarly situated, Plaintiffs,-against-RUDOLPH GIULIANI, Mayor of the City of New York, MARVA HAMMONS, Administrator of the New York City Human Resources Administration and Commissioner of the New York City Department of Social Services, and MARY E. GLASS, Commissioner of the New York State Department of Social Services, Defendants.

95 CV 0641 (SJ)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

119 F.Supp. 2d 181; 2000 U.S. Dist. LEXIS 13382; 71 Soc. Sec. Rep. Service 458; 11 Am. Disabilities Cas. (BNA) 1423

September 18, 2000, Decided

LexisNexis (TM) HEADNOTES-Core Concepts:

COUNSEL: For Plaintiffs: Susan J. Kohlmann, Esq., Karen B. Dine, Esq., David W. Oakland, Esq., WINTHROP, STIMSON, PUTNAM & ROBERTS, New York, NY.

For Plaintiffs: Armen H. Merjian, Esq., Virginia G. Shubert, Esq., HOUSING WORKS, INC., New York, NY.

For Plaintiffs: Victoria Neilson, Esq., HIV LAW PROJECT, New York, NY.

For City of New York, Defendant: K. Lesli Logorner, Esq., Lisa Brauner, Esq., Ruby Bradley, Esq., Paul Marks, Esq., MICHAEL D. HESS, The City of New York Law Department, New York, NY.

For State of New York, Defendant: Vincent Leong, Anne H. Bomser, Assistant Attorney General, ELLIOT SPITZER, Attorney General of the State of New York, New York, NY.

JUDGES: Sterling Johnson, Jr., U.S.D.J.

OPINION BY: Sterling Johnson, Jr.

OPINION:

MEMORANDUM AND ORDER

JOHNSON, District Judge:

This class action is brought by New York City residents with AIDS or HIV-related illnesses seeking equal and meaningful access to publicly subsidized benefits. Plaintiffs sued city and state officials, claiming violations of the Americans with Disabilities Act ("ADA"), the Medicaid Act, Section 504 of the Rehabilitation Act of 1974, and other violations of state and federal laws. After a lengthy period of discovery and motion practice, this Court held a bench trial on the merits of this case on May 1, 2000, May 2, 2000, June 20, 2000, June 21, 2000, and June 22, 2000. Based on the evidence and testimony presented at trial, the

Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Nature of the Case

Plaintiffs commenced this action against defendants for failure to provide meaningful and equal access to public benefits and services as required by the Americans with Disabilities Act and the Rehabilitation Act, and for failure to comply with numerous federal and state laws, including the Social Security Act, the Medicaid Act, the New York Social Services Law, and various regulations under these acts. Second Am. Compl. P1-2.

This Court has subject matter jurisdiction over the federal law claims against both City and State defendants pursuant to *28 U.S.C. § 1331* and exercises supplemental jurisdiction over the state law claims against only the City defendants pursuant to *28 U.S.C. § 1367*(a). *See* Second Am. Compl. P 6-8; Joint Pre-Trial Order at 3; *Henrietta D. v. Giuliani,* 81 F. Supp. 2d 425, 428 (E.D.N.Y. 2000).

The Division of AIDS Services and Income Support ("DASIS"), a division of the New York City Human Resources Administration ("HRA"), is the means for indigent individuals living with AIDS or clinical/symptomatic HIV to access critical subsistence benefits and services offered by City and State defendants. Rather than requiring persons with AIDS or clinical/symptomatic HIV illness to access the many programs administered by HRA on their own, DASIS case managers are responsible for assisting clients in applying for and maintaining public assistance, Medicaid, Food Stamps, housing, Social Security benefits, and other benefits and services. DASIS was known as the Division of AIDS Services ("DAS") until it was consolidated with HRA's Income Support division in 1997.

Plaintiff Class

This Court certified the original named plaintiffs as representatives of a class of "all DAS-eligible persons" who seek public assistance benefits and services. In order to be a DASIS client, an individual must be: a New York City resident who is "Medicaid eligible," and has been diagnosed with clinical/systematic HIV illness or AIDS. *Henrietta D. v. Giuliani,* 1996 U.S. Dist. LEXIS 22373 at *47; Tr. at 662: 9-12.

Pursuant to stipulation between the parties, Henry Bradley, Owen-Pahl Greene and Richard Torres intervened in this action "as representative named plaintiffs." Pre-Trial Odr. at 10 and Ex. 4.[1]

AIDS and the Need For Reasonable Modifications

People living with HIV and AIDS develop numerous illnesses and physical conditions not found in the general population, and experience manifestations of common illnesses that are much more aggressive, recurrent, and difficult to treat. Infections and cancers spread rapidly in a person whose immune system has been compromised, and the effectiveness of medicine is diminished by nutritional problems that limit the body's ability to absorb what is ingested. Illnesses that are not lethal to the general population can kill an HIV-infected person. For all these reasons, persons with AIDS and HIV-related disease experience serious functional limitations that make it extremely difficult, if not impossible in some cases, to negotiate the complicated City social service system on their own. *See Henrietta D. v. Giuliani,* 1996 U.S. Dist. LEXIS 22373 at *4-5; Tr. at 435:12-444:21.

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[1] Henrietta D. died shortly after this case was filed on February 28, 1995.

As the immune system deteriorates, persons infected with HIV progress from being asymptomatic to developing symptoms such as weight loss, severe gynecological infections, chronic diarrhea, and fatigue. Eventually, HIV and AIDS strips the body of all defenses, leaving the infected person unable to fend off or combat new and existing infection and illness. At this later stage of HIV infection, patients commonly develop "opportunistic infections" such as PCP pneumonia, cryptococcal meningitis, and Kaposi's Sarcoma, diseases particular to persons with compromised immune systems. These illnesses and infections eventually cause death. Tr. at 435:12-444:21.

The opportunistic infections and chronic conditions that result from a weakened immune system limit the HIV-infected person's ability to engage in regular activities of daily life such as traveling, standing in line, attending scheduled appointments, completing paper work, and otherwise negotiating medical and social service bureaucracies. Some examples of these conditions include: cytomegalovirus (CMV) retinitis, a visual impairment that often results in blindness; severe wasting syndrome, which causes chronic diarrhea, extreme fatigue and, in some instances, gait impairment; peripheral neuropathy, a disturbance of the peripheral nervous system that causes numbness or tingling of the hands and feet, weakness in the legs, arms and hands, and severe pain that can interfere with the ability to walk; and AIDS dementia complex, a neurocognitive dysfunction that can interfere with the ability to understand written materials and/or fill out forms. Tr. at 435:12-444:21.

Functional limitations also develop from the primary drugs used to combat AIDS and HIV-related disease, among them AZT, DDI, ddC, protease inhibitors, and anti-neoplastic agents. These medications result in anemia and other side effects, with concomitant fatigue, shortness of breath, and other physical limitations. An individual receiving this common regime of prescription drugs likely will be restricted in his or her ability to walk, stand, or travel. Other side effects include enhanced neuropathy, diarrhea, nausea, and vomiting. Tr. at 442:6-21.

The latest medical development in the fight against HIV disease is the prescription of so-called "drug cocktails," which consist of two older AIDS drugs, such as AZT and 3TC, and the latest anti-viral drugs, protease inhibitors. These drugs create added complications for patients including extremely cumbersome treatment regimens and serious side effects, such as nausea and gastrointestinal symptoms. The drugs must be taken several times a day, some on an empty stomach and some after meals, and treatment regimens can include up to sixty pills a day. Additionally, some of these drugs require refrigeration. Tr. at 441:24-444:11.

People living with AIDS and HIV also have a particularly hard time obtaining adequate nutrition. Illness and infection often limit the appetite and the body's ability to absorb nutrients, and common HIV-related conditions like oral thrush can physically limit the ability to swallow. Nausea, a common side effect of drugs used to treat AIDS and HIV infection, can also result in an inability to eat properly. Due to HIV-related disease, many HIV-infected persons have dietary restrictions. These nutritional restrictions can be difficult or impossible to maintain. Poverty, limited mobility, and limited resources result in limited access to fresh, high-quality food, and necessary dietary supplements. Pl. Ex. 13, at 3-4.

Stress is another critical problem faced by people living with AIDS and HIV. HIV-infected persons necessarily struggle with many stresses in their lives, including the likelihood of early death, management of a multitude of symptoms and medications, the future welfare of their children, rejection of friends and family, stigma, and discrimination. The added stress of lack of housing, food, medical care, or other basic survival services that indigent people face poses a serious threat to health. Medical evidence suggests that stress causes further weakening of the immune system in HIV-infected persons, making it even more difficult to fight illnesses and infections. Tr. at 444:12-21.

The requirement that persons with AIDS and advanced HIV disease travel to and wait in infection-ridden public waiting rooms can be dangerous, and even life-threatening, for this population, all of whom suffer from severely weakened immune systems. Persons with AIDS, for example, are highly susceptible to tuberculosis and other infectious diseases. Thus, persons with AIDS and advanced HIV disease require medically appropriate conditions in which to establish, receive, and maintain their benefits, as well as medically appropriate housing. Tr. at 436:5-440:23.

Witnesses at Trial

Henry Bradley

Henry Bradley is a fifty-one year old man who has been disabled with AIDS since 1983. Tr. at 40:15-22. As a result of his disability, he suffers from symptoms including numbness in his extremities, fungal infections that cause his teeth and nails to fall out, and severe rashes. To control the disease, Mr. Bradley currently follows a medication regimen that requires taking fifty-one different tablets, plus liquid supplements, daily. Mr Bradley experiences certain side effects from the medication, including loss of bowel control, blurred vision, and occasional loss of short-term memory. Tr. at 41:6-43:9. While a DASIS client, Mr. Bradley has slept poorly, suffering from chills and sweats during the night, and he has lost over thirty pounds. *See* Def. Ex. S at P 24.

In 1993 and 1994, Mr. Bradley resided at 775 Riverside Drive. Tr. at 45:7-9. After initially funding Mr. Bradley's housing, DASIS closed his case without notice in February, 1994. Tr. at 50:16-51:1. *See* P.Ex. 33. Mr. Bradley sought a conference with DASIS, but was refused and instead had to file for a fair hearing. The fair hearing decision in his favor ordered DASIS to reopen the case, pay the benefits due retroactively, and to notify Mr. Bradley about any further decisions. Tr. at 51:20-53:2.

Despite the fair hearing decision, DASIS did not pay the rent arrears and Mr. Bradley lost his apartment. Tr. at 53:9-14. During this time, Mr. Bradley's Medicaid was not active, and he was unable to maintain his medication regimen. Tr. at 54:1-4.

In November 1994, DASIS did pay the overdue benefits to Mr. Bradley. However, DASIS then immediately closed his case again without notice.[2] Tr. at 54:14-55:23. During this time, DASIS knew where to reach Mr. Bradley. 56:7-14. *See* Pl. Ex. 33.

From November 1994 to April 1995, Mr. Bradley was without shelter allowance, cash assistance, food stamps, or medical assistance. During this time without public benefits, Mr. Bradley relied primarily on church charity in order to live. Again he was unable to maintain his medication regimen for this time period, and his health deteriorated from the constant worry about day-to-day survival. Tr. at 56:25-57:20. *See* Def. Ex. S at PP 8, 24.

Each time Mr. Bradley won a fair hearing decision, DASIS employees would direct Mr. Bradley to take his complaints to a noncompliance center to file a complaint. Mr. Bradley was forced to wait upon arrival and would eventually receive a computer printout that would describe what should be done to achieve DASIS' compliance. Then, he would be instructed by the staff to take the printout to the liaison office and to await further contact. This further contact never occurred. Mr. Bradley would do this once every twenty or thirty days with no result. Tr. at 58: 21-59:11.

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[2] At trial, City defendants produced a witness as evidence that on one occasion, Mr. Bradley received notice on the acknowledgment form he signed when he picked up his check. However, because the Fair Hearing decision reversing City defendants' actions has already determined the inadequacy of this notice, this evidence does not bear on this case. *See*, e.g., Pl. Ex. 59 at 2, PP 2 and 3 (finding "the Agency discontinued ... without notice" public assistance, Medicaid and Food Stamp benefits).

Although Mr. Bradley sought DASIS' assistance in securing a permanent apartment, no help was forthcoming. When he independently found an apartment, he brought the lease to his case manager at DASIS shortly before mid-August 1995; Mr. Bradley understood that his application would be processed. Tr. at 59:17-60:12. Instead, his case was closed for a third time, without notice, on August 14, 1995. Mr. Bradley did not learn of this closure until he discovered that he lost the apartment because DASIS had not processed the application. Tr. at 61:21-62:8.

Mr. Bradley again contacted more than twenty people at DASIS in an attempt to have a conference and avoid the delays caused by seeking a fair hearing and then Seeking to force compliance with the decisions; DASIS refused him every time without explanation. Tr. at 63:3-14. From August 1995 to July 1996, Mr. Bradley did not receive any benefits. Mr. Bradley survived by depending on different charitable organizations and churches. His Medicaid was affected by the case closing and he was not able to follow his medication regime for over two years. As a result, his health deteriorated, affecting his vision, and multiplying his regimen from 3 tablets per day to seventeen tablets three times per day. Tr. at 64:18-65:23. *See* Def. Ex. S at P 24.

Mr. Bradley sought a fair hearing and received a favorable determination in July, 1996. DASIS was ordered to restore his benefits retroactively, reversing the discontinuance of his medical assistance benefits and food stamps. However, in September 1996 DASIS complied with the decision for only one day and then closed the case the next day for a fourth time without notice to Mr. Bradley. Tr. at 69:14-70:15.

Mr. Bradley did not know why his case was closed yet again. Tr. at 71: 6-15. In questioning different people at DASIS, he received different answers regarding his case status. Tr. at 71:25-72:12. When he sought help from the noncompliance unit, he received the same chain of instructions as before: receive a computer printout from the noncompliance unit, deliver it to the liaison unit and await contact. As before, that contact never came. Tr. at 73:2-25. *See* Pl. Ex. 69.

Mr. Bradley's complaints to the noncompliance unit in Albany did not resolve the issue. Tr. at 77:16-20; 78:1-9. *See* Pl. Ex. 70. Mr. Bradley did not seek another fair hearing in 1996 or 1997 because DASIS employees told him that it was unnecessary and useless to seek a new fair hearing merely to enforce the original decision. Tr. at 78:24-79:21.

In 1996, DASIS approved rental assistance for an apartment for Mr. Bradley but failed to make payments after he moved into the apartment. Tr. at 85:12-24. As a result, Mr. Bradley was forced to pay the rent out of his social security payments, and to get by otherwise with almost no income. Tr. at 88:3-19. Finally in April 1998, Mr. Bradley received notice from DASIS that they would comply with the 1996 fair hearing order and repay part of the back rent that had accrued. Tr. at 89:13-20. Defendants were compelled to reimburse Mr. Bradley $ 7,132.00 in public assistance benefits that defendants wrongfully withheld during the period from July 1, 1995 to April 12, 1998, almost three years of welfare benefits. Tr. at 121-22. However, DASIS did not repay over four thousand dollars in rent that Mr. Bradley paid out of his SSI payments.[3] Tr. at 89:13-20, 121:8-122:6. *See* Pl. Exs. 73, 51, 38.

The same April 1998 letter from the noncompliance unit stated that Mr. Bradley would receive the food stamps due from August 1996 until March 1998. During this time without food stamps, Mr. Bradley was forced to go from church to church in search of food. However, even after April 1998, Mr. Bradley did not receive his food stamps consistently. Tr. at 89:25-90:19. *See* Pl. Ex. 73.

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[3] At trial, City defendants produced a witness who said Mr. Bradley's rental benefits were not paid because his landlady was on public assistance and already received the full rental value of the apartment from the City in a separate public assistance case. Tr. at 794:3-23. HRA was responsible for paying the landlady her benefits. Mr. Bradley's DASIS case manager visited the apartment and approved rental payments to the landlady, and DASIS was aware of the landlady's name as set forth on the application Mr. Bradley submitted to DASIS. Tr. at 184:2-13. However, at no time while Mr. Bradley resided at that address did DASIS ever inform him of the problem. Tr. at 184:14-21. Throughout the relevant period, DASIS failed to pay Mr. Bradley's rent as a result DASIS' wrongful closure of his case. Indeed, in 1998, DASIS paid thousands of dollars in back rent to Mr. Bradley's landlady. Tr. at 85:16-86:5. Only when Mr. Bradley sought compensation for his own expenditures during this two-year period did DASIS provide this excuse.

In 1998, Mr. Bradley's DASIS case was closed yet again and he was transferred to regular public assistance. Tr. at 91:9-20. He did not know that his new case manager, Ms. Davis, was not a DASIS employee until he called her. When he responded in person to a letter setting an appointment with Ms. Davis, she told him through a phone bank that she never sent the notice and that she did not handle DASIS clients. Tr. at 92:24-93:24, 100:3-10, 101:15-24. *See* Pl. Exs. 71, 72.

Before Mr. Bradley was allowed back to DASIS, he received another letter from a Mark Limerick of DASIS stating that, in order to become a client, he had to resubmit documents he had already submitted to DASIS. Mr. Limerick arranged to meet Mr. Bradley at his home to get the paperwork but failed to show up for the appointment. Mr. Bradley then went to DASIS' office in person and resubmitted the documents. Tr. at 96:24-97:24. Although Mr. Limerick told Mr. Bradley that the transfer back to DASIS would take a week, Mr. Bradley was not transferred back for three to four weeks. 99:1-3. *See* Pl. Ex. 56.

In 1998, DASIS sent Mr. Bradley notice of an award of food stamps for the month of September only. Tr. at 104:10-12. The same day, Mr. Bradley received a letter stating that DASIS intended to terminate his public assistance on September 11, 1998, and to reduce his food stamps to only ten dollars per month. Tr. at 105:17-106:16.

No one at DASIS could explain to Mr. Bradley why the notices were sent. Tr. at 107:7-10. *See* Pl. Exs. 64, 62.

In response, Mr. Bradley requested a fair hearing. On September 8, 1998, the hearing officer reversed DASIS' computation of benefits and directed DASIS to restore lost public assistance and food stamp benefits retroactive to August 1996. Tr. at 110:9-23. Despite the fair hearing decision, DASIS did not restore the lost housing benefits, and has not paid for the lost benefits since then. Nor did DASIS pay a nutrition and transportation allowance following this decision. Tr. at 114:11-20. *See* Pl. Ex. 67 at 5.

Mr. Bradley then received a notice informing him that DASIS intended to close his public assistance case yet again on September 15, 1998, for reason "21-5." Tr. at 111:9-14, 111:21-112:6. No one at DASIS could explain what the numerical notation meant. Tr. at 112:13-113:14. *See* Pl. Ex. 66.

Mr. Bradley first sought to gain compliance with the 1998 fair hearing decision by following instructions to contact the noncompliance unit and take their printouts to the liaison office, where he was told that he would be contacted. Mr. Bradley was never contacted. Tr. at 114:9-115:9. After he contacted the State compliance unit, a director at that unit told him that he would be contacted when compliance was achieved. Mr. Bradley was never again contacted about compliance with the fair hearing, and the retroactive benefits were never paid. Tr. at 117:18-118:6. *See* Pl. Ex. 74.

DASIS' own records noted that in May 1998 Mr. Bradley's case was open and "in fine shape," but then closed as of October 1998. This notation added that sufficient income to meet needs should not have caused the closure, since Mr. Bradley's income had not changed. The discrepancy was not explained. Tr. at 119:8-120:5, 120:9-21. *See* Pl. Ex. 45.

In 1999, Mr. Bradley brought in a lease with a request for moving expenses, and a supervisor at DASIS accompanied him to view the apartment. However, a few weeks later, in May 1999, Mr. Bradley's case was closed without notice for a fifth time. Tr. at 125:9-23. Again Mr. Bradley sought conferences that were refused. Tr. at 126:3-127:23. *See* Pl. Ex. 143.

Mr. Bradley had informed DASIS of his new address and had received correspondence from DASIS at the new apartment. Tr. at 130:2-12. In fact, DASIS had approved the apartment and was paying the rent for the apartment directly to the new address. Nonetheless, in August 1999, DASIS erroneously mailed a letter to Mr. Bradley's prior address scheduling a face-to-face appointment for September 1, 1999. Tr. at 131:1-9. Mr. Bradley only learned of the appointment in a phone call with DASIS when he learned that his case had been closed for failure to attend the appointment. 131:14-132:17. *See* Pl. Ex. 141.

In November 1999, Mr. Bradley reached an agreement with DASIS to retire alleged utility arrears from the apartment that DASIS had required him to move out of in 1994. Mr. Bradley followed the required steps and secured DASIS' agreement and approval to pay the arrears in November 1999. DASIS failed to pay the arrears, however, and Mr. Bradley's utilities were terminated suddenly and without notice in January 2000. The electricity cut-off spoiled the refrigeration of his medicines and liquid supplements. Tr. at 133:9-134:4.

This year (2000), Mr. Bradley was again forced to seek a fair hearing when DASIS issued a notice of intent to reduce his benefits by recoupment of half of the money being paid in rent. Mr Bradley prevailed again; the order reversed the recoupment and directed DASIS to continue benefits. Tr. at 139:1-140:23. *See* Pl. Ex. 138.

On March 3, 2000, DASIS again erroneously mailed a letter to Mr. Bradley's old address requiring Mr. Bradley to report for recertification. DASIS had mailed the envelope to his old Manhattan address, yet the notice inside listed his correct new address in Brooklyn. Mr. Bradley only learned of this letter after he contacted DASIS in late March, 2000. Tr. at 141:7-12, 142:14-143:22. Despite knowing Mr. Bradley's correct address, despite paying rent on the current address, and despite the fact that Mr. Bradley corrected this same mistake in 1999, this was the second time DASIS mailed a notice critical to Mr. Bradley's continued receipt of benefits to the wrong address. *See supra*, P 35. Mr. Bradley's case was closed as a result of the mistake and yet again had to be reopened. Ptf. Mem at P 39. *See* Pl. Ex. 136.

In sum, because DASIS' failed to properly assist Mr. Bradley, he was deprived of critical subsistence benefits, to which he was fully entitled, for years. As a result of DASIS' unwillingness or inability to correct his case, Mr. Bradley was repeatedly unable to access his Medicaid benefits, at one point for approximately two years. *See infra* PP 14-15, 19-20, 21-22. Without Medicaid, he was unable to take his medication, causing his toenails, fingernails, and even his teeth to fall out. *See infra* P 14. DASIS failed to make any rent payments on behalf of Mr. Bradley for almost two years, and DASIS failed to provide Mr. Bradley with any food stamps for almost two years. *See infra* PP 24, 26. During this time, Mr. Bradley was unfairly compelled to pay nearly three-quarters of his monthly SSI income toward rent, leaving him little money on which to live and forcing him, inter alia, to go to soup kitchens merely to survive. *See infra* PP20, 25.

Mr. Bradley's right to these benefits was unequivocally established in fair hearing proceedings, [4] which DASIS repeatedly chose to ignore. *See infra* PP 19, 21, 24, 29, 31, 45.

DASIS' repeated failures continued virtually to the date of trial. In failing to register the correct address for Mr. Bradley in 1999, DASIS erroneously mailed him a recertification notice at his old address, and then cut off his much-needed public benefits. *See infra* PP 33, 34. After Mr. Bradley corrected the Agency's error, moreover, DASIS repeated the mistake in 2000, *See infra* PP 35, 37, although it appears that DASIS had Mr. Bradley's correct address all along; that DASIS was, in fact, simultaneously mailing rent checks to Mr. Bradley's correct address; and that DASIS even entered the correct address on the notice contained in an envelope mailed to the incorrect address. *See infra* PP 35-36, 38. These were subsistence benefits upon which Mr. Bradley depended for his maintenance. Mr. Bradley testified that he was forced "to go to different churches and sit around the street and wait for people to come with bags so that you could get something to eat because I didn't know what I was going to do." Tr. at 57:11-13.

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[4] Indeed, in each instance that DASIS terminated Mr. Bradley's benefits, Mr. Bradley pursued and obtained a judicial declaration that DASIS' actions were wrongful.

Owen Pahl-Greene

Owen-Pahl Greene is a forty-five year old man who lives with full-blown AIDS. Because of AIDS and the medications he uses, Mr. Greene suffers from a number of secondary symptoms and illnesses, including chronic fatigue, wasting syndrome, cryptoceriotis, problems with his respiratory tract and his skin and skeletal structure, and opportunistic infections and infestations, as well as blurred vision, headaches, diarrhea, constipation, vomiting, and infections on his fingernails and toenails. Tr. at 187:15-188:22. His T-cell count fluctuates and has fallen as low as twenty-two. He uses up to eleven different types of medication for AIDS. Tr. at 188:24-189:7, 189:20-190:5.

Mr. Greene applied for benefits through DASIS in October 1997, while homeless, and became a client in November 1997. Tr. at 191:6-13. DASIS did not provide any permanent housing to him at that time, but placed Mr. Greene in the Allerton Hotel, in a room which was vermin- and cockroach-infested, and lacked adequate heat or suitable bedding. Tr. at 194:10-17, 196:22-197:24, 201:11-202-17.

Although some of Mr. Greene's medication required refrigeration, the Allerton Hotel did not provide any. When Mr. Greene informed his DASIS case manager about this issue and his concerns that the medicine would spoil, his DASIS case manager instructed him to place it outside the window in the snow. As a result, the medicine froze and was ruined. When Mr. Greene sought to replace his needed medicine, his case manager accused Mr. Greene of deliberately selling the medicine and seeking a replacement. Tr. at 199:5-200:5.

The day before Thanksgiving 1997, DASIS failed to renew Mr. Greene's temporary housing. When he returned to the hotel, Mr. Greene was locked out and was not allowed to retrieve his clothing or medication, forcing him to go homeless on the streets without adequate clothing and without medication for three days and nights. Tr. at 198:16-23, 205:5-206:2. When he was unable to reach his case manager the following Monday and no one at the case management level seemed able to help, Mr. Greene went directly to Gregory Caldwell, the Commissioner of DASIS, who promised that Mr. Greene would be admitted to the hotel that evening. Mr. Caldwell also asked for a copy of the notes that Mr. Greene was keeping. Tr. at 208:18-23, 209:20-210:17. Mr. Greene stayed at a Kinko's branch late into the night transcribing the notes and faxing them to Mr. Caldwell. Tr. at 211:24-212:2. The Allerton Hotel then refused admittance to Mr. Greene based on an unstated curfew policy, and again refused him access to his clothes or his medication. Because of the breakdown in communication and service from DASIS, Mr. Greene spent yet another night homeless. Tr. at 213:7-8, 214:20-215:25. *See* Pl. Exs. 118, 117, 116.

On New Year's Eve, December 31, 1997, DASIS moved Mr. Greene from the Allerton to the McBurney YMCA. Tr. at 222:17-22. When Mr. Greene arrived, however, no room was immediately available for him. Tr. at 223:21-24. Eventually, he was placed in a room with no heat, a broken window, and no refrigeration. Tr. at 224:19-225:7. Although his DASIS case manager promised to locate appropriate housing the next day, he failed to do so. Tr. at 225:15-23. Although Mr. Greene complained, DASIS failed to move Mr. Greene to habitable living quarters or to fix his room. Tr. at 226:23-227:17. *See* Pl. Ex. 150.

Following DASIS' failure to assist him in securing permanent housing, Mr. Greene suffered a breakdown and was hospitalized at St. Vincent's Hospital in January, 1998. Tr. at 240:20-241:22. Mr. Greene undertook a hunger strike while hospitalized to draw attention to DASIS' failure to assist his search for housing. Tr. at 241:8-242:17.

Mr. Greene left the hospital after being told by DASIS that housing was available, only to discover after discharge that DASIS did not have any such available housing. Tr. at 244:12-14, 244:25-245:2.

DASIS later placed Mr. Greene into a room at the Crown Hotel, in which (i) raw sewage backed up the bathtub and toilet, (ii) vermin infested the facility, (iii) only soiled carpets, beds, and linens were available, and (iv) no refrigeration for his medication was available. Tr. at 247:3-20, 248:2-3. Although he reported the sewage problems to DASIS, no one from DASIS ever visited the hotel or sought to move Mr. Greene elsewhere. Tr. at 248:15-249:7. *See* Pl. Ex. 119.

In November 1998, Mr. Greene discovered that DASIS had closed his case without notice. Mr. Greene requested a fair hearing which he won. Tr. at 252:2-7. The judge ordered

DASIS to restore the lost benefits and continue Mr. Greene's case. Tr. at 253:3-18.

Before trial, Mr. Greene decided to stop using DASIS' services because he felt that dealing with the agency was detrimental to his health. Mr. Greene today continues to subsist on SSI benefits and private charity. Tr. at 254:15-19.

In sum, DASIS' failure to renew his emergency housing placement, in late November and early December 1997, led Mr. Greene to spend three consecutive nights homeless on the streets and in the subways of New York, without proper clothing and without his medication. *See infra* P 44. Furthermore, DASIS placed Mr. Greene in, and failed to move him out of, emergency housing without heat or refrigeration for his medications, and with an open window, for one month in the middle of winter *See infra* PP 45. DASIS also placed Mr. Greene in, and failed to move him out of, emergency housing with, among other things, two inches of raw sewage backed up in the bathtub. *See infra* P 49; Tr. at 249:1-2; Pl. Ex. 119.

Richard Torres

Richard Torres is a forty-six year old man who was diagnosed with AIDS in 1988. Mr. Torres has been a DASIS client since at least 1995. At present, his primary symptoms are fatigue, depression, and anxiety. His most recent T-cell count was 134. Tr. at 302:19-303:16, 304:9-12. Before trial, Mr. Torres stopped using DASIS because of the stress involved in dealing with the agency and his doctor's advice that his viral load and T-cell count were detrimentally affected during his periods of stress while dealing with DASIS. Tr. at 344:19-345:4. *See* Def. Ex. M at P2.

In 1996, Mr. Torres left the apartment in which he was living in Bushwick, Brooklyn, due to water leaks so bad they rendered it uninhabitable. Although he informed his DASIS case manager about the problem, DASIS did not do anything directly about the problem, nor did they assist Mr. Torres in locating or securing a new apartment. Tr. at 305:14-306:7, 306:13-19.

Mr. Torres then sought emergency housing from DASIS. On several occasions, DASIS failed to provide Mr. Torres with emergency housing. On such occasions, Mr. Torres' case manager sent him to barracks-style shelters without individual rooms or refrigeration, unsuitable for persons with AIDS. Tr. at 308:14-309:19, 310:13-14, 312:19-21. At other times, Mr. Torres was forced to stay on the streets despite having sought DASIS' assistance. Tr. at 311: 14-16.

Because of the stress of dealing with DASIS and trying to secure emergency housing, Mr. Torres stopped dealing with DASIS in 1996. He privately located shelter through a VA shelter and then an establishment called Gift of Love, run by nuns for people living with AIDS. Tr. at 311:21-312:14.

In December 1997, Mr. Torres independently located permanent housing in Coney Island and asked DASIS for assistance. Although he submitted all required paperwork, DASIS did not act on the lease for over two months and Mr. Torres consequently lost the apartment. Tr. at 312:23-318:3.

Again, in January 1998, Mr. Torres sought help from DASIS and completed an application for permanent housing. In February, Mr. Torres brought another Coney Island apartment to DASIS' attention and asked for assistance. DASIS failed to act on the apartment, and Mr. Torres lost that apartment as well. At no time did his case manager or anyone at DASIS tell Mr. Torres that any further paperwork was necessary, that his case was closed, or that the application was incomplete. Tr. at 315:16-318:11.

On July 30, 1998, Mr. Torres missed curfew at the Gift of Love and went to the DASIS center in Brooklyn to seek emergency housing. Tr. at 322:10-323:324:7. His case manager referred him to an address in Upper Manhattan; however, no such address existed and he was again forced to be homeless for the night. Tr. at 323:21-325:15, 325:22-23. Another worker at DASIS confirmed in a phone call that the address Mr. Torres sought was in fact the address to which his case manager had referred him. Tr. at 325:25-326:9, 326:14-327:17.

In July 1998, Mr. Torres inquired of DASIS as to the status of his application for permanent housing. Although Mr. Torres had applied for permanent housing in January 1998, his case manager stated that he could not locate the application and required Mr. Torres to fill out a new application. After filling out the application, Mr. Torres sought a receipt but was told by the case manager that receipts were not given. The DASIS Law requires that receipts be furnished. N.Y.City Admin. Code § 21-128(c)(1). No one at DASIS at that time informed Mr. Torres that his application was incomplete or that his case was closed. Tr. at 329:16-331:12; *See* Pl Ex. 32, at 3.

In August 1998, Mr. Torres found new housing at Casa Betsaida, a residence for people living with AIDS in Williamsburg, Brooklyn. Tr. at 333:14-19. When he contacted DASIS about his application for permanent housing, he was again told that it was lost and was asked to fill out yet another application. Tr. at 334:7-16. In September 1998, Mr. Torres submitted a lease for Casa Betsaida to his new case manager at DASIS, who informed him that the application would take some time. Mr. Torres again asked for a receipt but his case manager at DASIS refused to provide one. Tr. at 337:4-338:7. Even after Mr. Torres told the case manager that he was threatened with eviction, his case manager did not do anything other than say that it would take time. Tr. at 338: 18-339:15. When Mr. Torres and his landlord jointly spoke to the case manager, the DASIS case manager again gave the same response. Only then was Mr. Torres told for the first time that he needed to submit additional documents regarding his SSI award. At no time during this period from September 1998 to December 1998 did anyone inform Mr. Torres that his public assistance case was closed. Tr. at 339:20-340:18.

In December 1998, Mr. Torres went to see his case manager about the pending application. He discovered from another case manager, Ms. McCray, that his case had been closed for about a year. Tr. at 341:13-20. At no point prior to this had anyone informed him that the case was closed; Mr. Torres had been waiting since January for DASIS to act on his application for permanent housing. Tr. at 342:5-6. He had brought apartments to DASIS' attention in January and February, only to lose them through DASIS' delay. He had reapplied for permanent housing in July because DASIS lost the original application. Mr. Torres had waited months, facing eviction from Casa Betsaida, for DASIS to pay his current rent. All along, his DASIS case manager consistently told Mr. Torres that DASIS was working on the permanent housing application. Suddenly, in December, DASIS told Mr. Torres that he would have to reapply yet again. When Mr. Torres asked why he had not been informed, Ms. McCray stated that the case managers were not properly trained. Tr. at 342:17-25.

In April 1999, DASIS had opened his case, following his intervention in the instant case. Nonetheless, Mr. Torres discovered that his case was closed again only when he went to pick up his benefits. When he called to find out about the closure, he was told that he should have received a notice sent to him at his residence. Although he had provided DASIS with his address at Casa Betsaida and had submitted an application to DASIS for the lease there, Mr. Torres never received any such notice. Tr. at 343:21-344:18.

Mr. Torres never received the legally required nutrition and transportation supplement from DASIS. Tr. at 352:19-353:2.

Throughout, although Mr. Torres alerted DASIS to the deterioration of his apartment that left it uninhabitable, DASIS repeatedly failed to assist him in locating permanent housing, or even emergency housing. *See infra* PP 54-55. For a year, when Mr. Torres would submit permanent housing applications, DASIS failed to secure the apartments. *See infra* PP 57-58, 60-62. In fact, DASIS had failed for the entire year, despite Mr. Torres' numerous applications for permanent housing, to inform him that he needed to reapply for public assistance because his case had been closed for over a year. *See infra* P 62. After DASIS finally reopened his case, DASIS closed his case again without notice. *See infra* P 63.

Joy Lafontaine

Joy Lafontaine is a twenty-seven year old woman who was diagnosed with HIV in June 1996 and currently lives with AIDS. She suffers from symptoms including chronic diarrhea, weight loss, severe headaches and fainting spells. In April 1998, she was hospitalized for two to three weeks with pneumonia. She initially took a set of medicines, but stopped because they exacerbated her headaches. She is currently receiving Social Security as income. Tr. at 376:19-378:5.

Ms. Lafontaine became a DASIS client in January 1999 upon receiving an acceptance letter from the agency. She understood that the agency provided intensive case management to its clients. Ms. Lafontaine called the phone number provided in the acceptance letter and was told that she was assigned to the Kingsbridge Center in the Bronx, and was told that the name of her case manager was Ms. Isabell. Tr. at 378:22-380:14. *See* Pl. Ex. 155.

In March 1999, Ms. Isabell called Ms. Lafontaine at her new residence on West 111th Street in Manhattan and asked her to come in for an appointment and to bring documents regarding her current housing situation. Ms. Lafontaine did so, but did not receive any receipt for this. Tr. at 380:18-381:13. The case manager said that she could not do anything because of a pending fair hearing case regarding the termination of benefits before she became a DASIS client. Ms. Lafontaine informed Ms. Isabell that she had moved to the new address because she lost her electricity. Tr. at 381:16-382:11. Ms. Isabell did not explain any of DASIS' services or its nutrition and transportation supplement to Ms. Lafontaine. Tr. at 384:7-14. DASIS never told Ms. Lafontaine that she could apply for a grant to clear up the utility arrears created by the termination. Tr. at 384:22-385:15.

At this time in March, 1999, Ms. Lafontaine was living in her aunt's apartment with seven other people in only three bedrooms. She explained this situation to Ms. Isabell, who did not offer any assistance in locating other housing, but instructed Ms. Lafontaine to bring in the paperwork for any apartment she might find.[5] Tr. at 385:16-386:1.

In August, 1999, Ms. Lafontaine received a second acceptance letter from DASIS that was sent to her old address, and then forwarded to her aunt's address. The only difference between this letter and the one received in January was the date on the letter. No one at DASIS explained to her why DASIS sent two acceptance letters, or why the second letter was sent to her old address. Tr. at 387:5-388:3, Pl. Ex. 159.

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[5] Although the date is unclear, apparently at one point Ms. Isabell did inquire if Ms. Lafontaine wanted "scatter site" housing, which is supervised housing requiring the tenant to release control to caretakers and to maintain constant contact with those persons. Tr. at 400:15-401:7. Because Ms. Lafontaine is capable of independent living, she did not need or want such housing. Id.

In September 1999, Ms. Lafontaine located an apartment and brought the paperwork to Ms. Isabell. No receipt was given for the paperwork. Ms. Isabell had not assisted in finding the apartment, and two weeks after the papers were submitted, she called Ms. Lafontaine to tell her that the apartment was gone. Since then, Ms. Isabell has not assisted Ms. Lafontaine in looking for housing. Tr. at 388:11-389:17.

On November 16, 1999, Ms. Lafontaine received the nutritional and transportation supplements that she was entitled to upon acceptance to DASIS. However, DASIS did not explain the meaning of the grant; Ms. Lafontaine, who works as a peer counselor, learned about the supplement from her coworkers. Tr. at 389:20-390:11. Similarly, no one ever explained the letter she received on October 6, 1999, that purported to reduce her public assistance from $ 308.50 to $ 165. Tr. at 390:23-391:16. As a result of this reduction, Ms. Lafontaine went without Food Stamps for October and part of November. However, the change in Ms. Lafontaine's grant was never explained. Tr. at 392:2-14.

In sum, Joy Lafontaine testified to numerous instances where DASIS failed to provide intensive case management. Although she was accepted as a client in January 1999, and although she provided her DASIS case manager with documents and her new address when requested in March 1999, DASIS failed to pursue her public benefits case, mailed another acceptance letter to her old address five months later, and did not begin delivering benefits until November 1999. *See infra* PP 67-68, 70, 72. Her case manager never explained to her what benefits and services, such as nutrition and transportation supplements, might be available; never assisted her with a permanent housing application that Ms. Lafontaine procured individually; and never provided Ms. Lafontaine with receipts for her benefit and service requests. *See infra* PP 68, 71.

Service Providers.' Testimony Concerning DASIS

Plaintiffs presented the testimony of Cynthia Knox and Catherine Bowman, two representatives of service-providing agencies for people with AIDS. These witnesses interact daily with many DASIS-eligible people in the course of their regular work.

Cynthia Knox is the Director of the Legal Advocacy Program of Bronx AIDS Services. Tr. at 479:14-16. Bronx AIDS Services is the largest non-medical based provider offering HIV/AIDS services in the Bronx. Tr. at 479:22-23. Ms. Knox estimates that 85% of Bronx AIDS Services' clients are also clients of DASIS. Tr. at 480:20.

Ms. Knox is involved on a daily basis in assisting her clients accessing benefits and services from DASIS. Tr. at 480:25-481:4.

Ms. Knox has experienced "extensive problems in working with clients trying to access benefits and services through DASIS." Tr. at 484:22-485:4. She testified that (i) there are problems reaching case workers, (ii) her clients' public assistance cases have been improperly terminated without notice or adequate notice, and (iii) she had experience significant problems with regard to relocating clients, including having clients lose apartments or face eviction because of DASIS' failure timely to assist the clients. Tr. at 485:13-15, 485:20-486:2, 486:7-9.

Ms. Knox testified that she has daily problems reaching case managers that include calling but the case manager's phone is off the hook, not having her calls returned or not receiving a response to written correspondence or waiting several hours at a DASIS office to speak to someone concerning one of her clients. Tr. at 490:2-8, 490:11-18, 491:12-14, 492:9-14, 510:9-17.

Ms. Knox has been "told by case workers that they carry too many cases and are not able to do the work required of them to provide the services to clients." Tr. at 512:6-8.

Ms. Knox testified that on a daily basis DASIS case managers fail to make required home and hospital visits to her clients, sometimes for more than a year. As a result, desperately ill clients are not able to access benefits or end up on the brink of eviction. Tr. at 492:20-493:23, 494:21-495:3.

Ms. Knox also testified that DASIS case managers rarely fulfill their responsibility to assist clients in securing apartments and, in fact "it's the exception rather than rule" when they do--an exceptional case manager may fulfill responsibility. More often than not, and on a daily basis, DASIS case managers do not assist clients. Tr. at 496:11-497:2.

The failure to fulfill their responsibility to assist clients in finding permanent housing means that her "clients are faced with eviction and have no place to go." Tr. at 497:3-14.

Ms. Knox also testified that DASIS case managers, who are also supposed to assist with exceptions to policy, routinely do not provide such assistance. If the exceptions to policy are not processed, it may force clients to the brink of eviction or it could prevent clients from relocating or getting a new apartment. Tr. at 498:12-20, 499:10-18, 499:21-500:6.

Ms. Knox testified that though case managers have responsibility to provide receipts that state date application submitted and what papers are still required to complete an application, "in [her] experience [she has] not had a single client who received a receipt from DASIS with regard to an application." Tr. at 501:6-16; 501:21-502:1.

Ms. Knox further testified that she has experienced significant ongoing problems with DASIS budgeting a client's case improperly. The consequence of the improper budgeting is that "the client doesn't get the money entitled to to [*sic*] buy food, buy necessities of daily living, toilet paper and soap. Shelter can become a problem. . . clients are [left] trying to rely on charity of friends. . . ." Tr. at 503:25-504:5, 505:9-18.

As part of intensive case management, DASIS case managers have responsibility to make sure clients' cases are not closed. "For example, if papers are needed for recertification. . . and client can't come in, it is the responsibility [of the DASIS case manager] to go to the home or hospital and obtain the documentation necessary to recertify." Tr. at 506:2-14. However, in Ms. Knox's experience there have been many times where her clients' cases are closed without notice. Tr. at 506:24-507:1.

Ms. Knox also testified that, in her experience, there are many instances where DASIS fails to comply with fair hearing decision, sometimes for more than a year. Tr. at 509:20-24.

Ms. Knox testified that she "had many, many cases where clients' cases had been terminated and they [the clients] had not been given notice." Tr. at 515:4-6.

Ms. Knox also testified that despite DASIS' responsibility to provide intensive case management, her "clients rarely get intensive case management from DASIS." Tr. at 489:17-18. Her trial testimony echoed her deposition testimony that her "experience is that the majority of [her] clients do not receive the benefits of the intensive case management services to which they are entitled." Tr. at 520:11-13.

Catherine Bowman is the Deputy Director of the HIV Project at Brooklyn Legal Services Corporation B. Tr. at 529:16-17. Ms. Bowman "was a case manager at DAS from August of 1989 through August of 1990." Tr. at 531:7-8.

Ms. Bowman has a current case load of approximately 30 clients, of which approximately 90% are also DASIS clients, and she deals with client issues relating to DASIS on a daily basis. Tr. at 533:11-18; 534:2-5.

Ms. Bowman testified that her "clients are generally there to see [her] because they are having problems accessing their benefits. So [she is] regularly seeing people who are experiencing a great deal of difficulty in getting the benefits to which they are entitled." Tr. at 537:25-538:3.

Ms. Bowman described a "wide variety of problems. Some of those relate to what is the failure of DASIS to provide intensive case management for people, which is required under The DASIS Law. There are also problems with people getting the precise benefits that they are entitled to. We see a lot of people who are getting the wrong amount of cash benefits, the wrong amount of food stamps; people who are living in inappropriate housing; people who are having difficulties accessing all sorts of services." Tr. at 538:7-15.

Ms. Bowman testified that she has seen cases in the last year where clients requiring home or hospital visits from DASIS did not receive those visits. In some cases, the result of the failure to make those home visits meant that her clients failed to recertify and their public assistance cases were closed. Tr. at 541:11-19; 542:2-8.

Ms. Bowman testified that the failure of DASIS to assist clients in locating and securing permanent housing is a "very big problem," and is a daily problem. In any given time in their office they will have 40 people in need of permanent housing. Tr. at 548:2-13. Tellingly, Ms. Bowman, who has worked on many cases testified that she has "actually never seen a DASIS caseworker help someone find a permanent residence." Tr. at 548:14-15.

Ms. Bowman described the consequences of DASIS' failure: "We do have a few people who get evicted, despite the fact that we're trying to represent them. So, those people end up in SROs. More often, though, what this does is, it puts a burden on other agencies, ours included, and a lot of other community-based organizations that are providing case management for clients. And, in fact, this is such a pervasive problem for us that we have designed a booklet to give to clients, that has the names and phone numbers of all the community-based organizations that provide these services. And we actually also have realtor lists that we give out to clients. . . ." Tr. at 548:20-549:11.

Ms. Bowman testified that in all her experience working with DASIS clients, she has never seen a receipt. Tr. at 550:23.

Ms. Bowman also testified that 80% of her benefits cases have problems with DASIS not properly budgeting their cases. Tr. at 553:2-9.

Ms. Bowman further testified about the problem of having clients' public assistance cases closed, including that when a client's case is closed, "they don't have any money. . . ." Tr. at 555:24-556:5. Moreover, Ms. Bowman estimated that, "in about thirty percent of the cases that I see, the clients have no idea why their case was closed." Tr. at 555:22-23.

Additionally, once a public assistance case is closed, it can be difficult to reopen. "It can be very easy or incredibly difficult, depending on the situation. Sometimes you can call a caseworker, and the case does get reopened quickly. And sometimes, you know, you can call fifty people and try to get it reopened, and no one can tell you why it was closed. And, you know, it's very difficult to get cases reopened, and sometimes we have to go to a fair hearing to have them reopened." Tr. at 556:6-17.

However, even winning a fair hearing for her clients does not necessarily get her clients' cases reopened. With respect to the City's compliance with fair hearing decisions, Ms. Bowman testified: "We have a lot of difficulty with compliance. I would say in about seventy-five percent of the cases that we win fair hearings, that we have to struggle to get compliance." Tr. at 557:20-558:1.

Ms. Bowman explained to the Court her experience with defendants failure to comply:

> THE COURT: So, if a judge says, open the case, reopen the case, and give the client $ 100 a month, have you had trouble enforcing decisions such as that?
>
> WITNESS: Yes
>
> THE COURT: How many times, what percentage of the time?
>
> WITNESS: Well, I would say we see it -- getting the cases reopened, but getting things adequately budgeted, I would say about half[6] the time it takes a lot of effort on our part to follow up and make sure that the budgeting is done properly.
>
> THE COURT: Notwithstanding this court order?
>
> WITNESS: Yes

Tr. at 558:2-14.

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[6] Due to an error in the transcript, "half" is written as "have" in the official record. For purposes of readability, the Court has corrected the error in the text of the opinion.

Mr. John Maher, the deputy director of field operations for DASIS, claimed to have reviewed the case files of the plaintiffs who testified. Although he claimed to *See* "some" receipts in those files, he admitted that there were not always receipts. Tr. at 838:21-22.

The closure of the service aspects of a DASIS case are not reviewed by the State defendant by fair hearings or otherwise. Tr. at 751:5-9.

Furthermore, Mr. Maher admitted that when DASIS disagrees with a fair hearing decision, it will reduce or close a case again and force the client to seek another fair hearing. Tr. at 759:24-760:6, 761:15-762:8.

In summary, Cynthia Knox and Cathy Bowman provide advocacy on behalf of DASIS clients at two of the city's largest community-based providers of advocacy and services to persons living with AIDS. Ms. Knox and Ms. Bowman provided testimony, through their extensive, daily experiences with DASIS, that the problems experienced by the individual class members are part of a systemic and widespread problem at DASIS. Ms. Knox testified that she has experienced "extensive problems in working with clients trying to access benefits and services through DASIS," tr. at 484:22-485:3, an observation echoed by Ms. Bowman. Tr. at 538:1-3 ("So I'm regularly seeing people who are experiencing a great deal of difficulty in getting the benefits to which they are entitled.") Both witnesses provided specific examples of the sorts of recurrent problems that DASIS clients face as a result of DASIS' failure to provide the assistance, and the reasonable modifications, that DASIS is supposed to provide: improper termination of cases without adequate notice, failure to timely process requests for assistance, and lack of intensive case management. *See infra* PP 87-88, 99-100, 77, 78-80, 89, 92-93.) Both testified that DASIS case managers fail to make home visits, in some cases for an entire year, with tragic consequences. *See infra* PP 80, 94. Both testified that DASIS case managers rarely assist clients to obtain permanent housing. *See infra* PP 81, 95-96.[7] Both noted significant ongoing problems with misbudgeting a client's needs, depriving the client of the ability to buy the necessities of life, including food, toilet paper, and soap. *See infra* PP 85, 98. DASIS case managers "carry too many cases and are not able to do the work required of them to provide the services to clients," tr. at 512, and are unresponsive and out of reach. *See infra* PP 78-79. Even when a client obtains a fair hearing ordering DASIS to reopen a client's case and restore ongoing benefits, both testified that ensuring compliance was a struggle in up to seventy-five percent of cases. *See infra* PP 87, 100-102. Defendants, in fact, admitted in open court that such determinations were frequently flaunted. Mr. John Maher, DASIS' deputy director of field operations, admitted that even where a DASIS client wins a fair hearing concluding that DASIS wrongfully reduced or terminated the client's benefits, if "we believe we did the right thing, we take the action again." *See infra* P 105.

Statistical Evidence of Systemic Problems With DASIS

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[7] All four of the DASIS clients who testified cited DASIS' failure to assist them in locating permanent housing. This includes Mr. Bradley, *See* Tr. at 60; Mr. Greene *See* Tr. at 238-39, 251; Mr. Torres *See* Tr. at 314, 329-32, 334; and Ms. Lafontaine, *See* Tr. at 385-86, 388-89, 393.

At trial, plaintiffs presented an expert witness, Dr. Ernest Drucker, to address the statistical basis for plaintiffs' claims that DASIS experienced broad-based, systemic failure in achieving its mandate. Dr. Ernest Drucker is a professor of epidemiology and social medicine at Montefiore Medical Center who specializes in examining AIDS and its effects on the New York City population. He regularly uses and teaches about statistics in medical school. His curriculum vitae lists extensive publications regarding HIV and AIDS, as well as public health issues about homelessness and drug use. He has served on a number of advisory boards of HIV service organizations and he works for the Mayor's Office on AIDS Policy. Epidemiology is the field of medicine and public health that studies patterns of disease and populations. The science relies upon statistical analysis to examine differences in population and case incidences of disease. Tr. at 574:16-576:4, 580:20-22. *See* Pl. Ex. 9.

From September to December 1997, Dr. Drucker conducted a case study of all applicants for housing at one specific housing facility who applied to DASIS for rental approval. Dr. Drucker examined the length of time from the date that a completed application was submitted to DASIS to the date the initial benefits were issued, or the date the application was denied. Out of 37 consecutive applicants, only 31 submitted completed applications, of which 21 were approved. Eight remained pending on the date the study ended, and two were denied. Dr. Drucker measured the applications that were still pending to the date that the study closed; this estimate of the length of the time was therefore a conservative measurement of how long it took for the benefit to be issued. Tr. at 583:2-586:6, 588:6-14. *See* Pl. Exs. 8, at 3-5, 8A.

In over 77% of those 31 cases, the City failed to meet its own mandated time frames of 20 business days or approximately 30 calendar days. For those applicants who were not acted upon with the legally mandated time frames, the median length of time was 63 days but the range for applicants was up to 132 calendar days. The considerable delays in the approval of rental assistance shown in this report provide probative evidence of delays that are typical and systemic. Tr. at 586:4-20, 588:21-589:8. *See* Pl. Ex. 8, at 4, 8A.

Shortly before trial, the City produced a report that claims to report the average timeliness of DASIS in providing certain benefits and services.[8] This data was a roster dated May 12, 2000, of over 2,500 applications for a certain class of benefits referred to as "Case-by-Case Financial Assistance" (CBCFA) that were received at DASIS' central office from October 1, 1999, to December 31, 1999, and that were in fact approved by the central office. The types of benefits listed include, inter alia, new apartment rents, rent increases and ongoing rent requests, rent arrears, clothing allotments, and home establishment. This data listed by client and by DASIS center when the client first requested the benefit, when a completed application was received at central office, when it was approved, when the benefit issued, and what benefit or service was requested. Tr. at 593:10-595:3, 869:15-20, 871:4-9, 871:10-14, 871:15-17. *See* Pl. Ex. 202.

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[8] On the eve of trial, City defendants for the first time produced a report that claims to report the average timeliness of DASIS in providing certain benefits and services. The backup data kept by City defendants was not available at the time of Dr. D[illegible]er's study but was produced to plaintiffs only after trial actually began in this matter.

When no date is reported for the issuance of a benefit, either no benefit had yet issued as of the date of the report or else DASIS' Control Unit had no record that the benefit was in fact issued. Although City defendants alleged that for some cases no record will ever exist, e.g. because the client has passed away, City defendants submitted no evidence that this was more than a *de minimis* number. Accordingly, given that the run date is over four months after the close of the quarter, this Court finds that relying upon the run date of the report is an adequate substitute for the date the benefit or service is issued for those applications for which nothing is yet reported. Tr. at 880: 9-18.

> The DASIS Law [9] requires that where no statute, law, regulation or rule provides a time period within which a benefit or service shall be provided to an eligible person who requests such a benefit or service, such benefit or service shall be provided no later than twenty business days following submission of all information or documentation required to determine eligibility.

N.Y. Admin. Code § 21-128(c)(2). In other words, if a person applies for a benefit or service and is determined to be eligible, DASIS must provide the benefit or service within twenty business days from the date the application is complete. Thus, using the City defendants' backup data, it is appropriate to determine timeliness by comparing when the completed application was submitted and when the benefit issued. Although Deputy Commissioner Caldwell stated he would use the "Approval" date for this purpose, the municipal law is clear. Furthermore, the testimony of Lloyd Kass, DASIS' Director of Quality Assurance, indicates that "Date In" is the last measuring date that could be used, since the operative legal date is the date the completed application was submitted, not when it is subsequently approved, and since all applications in question were in fact approved and thus eligible. More importantly, the date of the submission of the completed application is appropriately used because at that point the applicant has no more control over the processing and issuance of the benefit, and the onus rests with DASIS to perform in a timely manner. Tr. at 869:12-870:14. *See* Pl. Ex. 32.

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[9] also referred to herein as Local Law 49

To circumvent the vagaries in computing business days, and because twenty business days will include eight weekend days, the Court finds that thirty calendar days is a legitimate -- and conservative -- measurement for the twenty business day rule.

A manually tabulated summary of the data provided by City defendants revealed that throughout all of New York City, for all of the benefits and services tracked in the database, 32.9% of all eligible requests were not issued within thirty calendar days. In other words, approximately one-third of all benefits took more than thirty days to issue. As such, and by admission, DASIS is not complying with its own mandates and is violating the DASIS Law. Tr. at

598:9-13, 700:22-701:3, 701:17-702:15. *See* Pl. Exs. 202 and 203 at Col. 5.

Even more egregious, the Amsterdam, Kingsbridge and IHSU Waverly centers all failed timely to deliver benefits 44.6%, 45.4% and 46.9% of the time, respectively. The summary of timeliness of delivery of benefits for all applications at the various centers is set forth below:

Data Run Dated Friday, May 12, 2000

"Benefit Issued-Reporting Dates 10/1/99 To 12/31/99"

Center	Total Applications	Calendar Days *		Percenta
		</=30 Days	>30 Days	>30 Day
Amsterdam	148	82	66	44.6%
Bergen	294	232	62	21.1%
Brownsville	483	303	180	37.3%
Greenwood	349	226	123	35.2%
IHSU (Waverly)	256	136	120	46.9%
Kingsbridge	355	194	161	45.4%
Queensboro	261	209	52	19.9%
St. Nicholas	233	180	53	22.7%
Staten Island	67	61	6	9.0%
Waverly	122	100	22	18.0%
Total	2568	1723	845	32.9%

* Measures number of calendar days between dates reported in columns labeled "date in" and "benefit issued." In cases where no benefit had yet issued, used date of report.

Tr. at 596:14-20, 598:6-9. *See* Pl. Exs. 202 and 203, at 1.

The range of time in which benefits are issued may extend far beyond the thirty-day time frame into the hundreds of days. For example, many eligible clients who submitted requests for benefits in late November or early December did not receive their benefits until April 2000, and some still had not received any benefit as of May 12, 2000. The range of timeframes for the delivery of these benefits and services ranged from 31 days to over 200 days. *See, e.g.*, Tr. at 884:14-886:4. *See* Pl. Exs. 202 at 13, 69; Pl. Ex. 203, at Col. 6.

An examination of requests for new apartment applications during the October-December, 1999 time period corroborates the sample study performed by Dr. Drucker in 1997-98. For example, at the Amsterdam center eighteen of forty applications took more than thirty days to complete; i.e., 45% of new apartment benefits were not timely delivered after an eligible application was delivered to DASIS' central office. Overall, new apartment benefits and services were not timely delivered 32.1% of the time. Tr. at 599:19-600:10; Pl. Ex. 203, at 2.

Furthermore, these figures likely understates the problem. Rather than measure timeliness from the submission of the completed application to the client's case manager, DASIS measures timeliness from the date that DASIS' Central Unit receives the completed application. Cf. N.Y.City Admin. Code § 21-128(c)(2)(requiring issuance of benefit or service within 20 business days of *submission* of completed eligible application). Hence, the actual length of time between submission and issuance is likely greater than reported. Tr. at 599:19-600:16; 618:24-619:16; 886:14-887:11.

The same data used to generate these summaries is the basis of a portion of a Quarterly Performance Report ("QPR") that City defendants produce pursuant to the DASIS Law. That portion reports on the average numbers of days it takes for a benefit to be issued. By taking an average, that report minimizes the number of failures to timely deliver benefits, "diluting" them with those cases in which DASIS meets is legal obligations. For example, where an average for providing a specific type of benefit at one center is 27 days, that figure masks the number of applications whose benefits are not issued for over twenty business days. Tr. at 873:8-874:1. *See* Pl. Ex. 5C at 16.

The database used for both the QPR and for the summaries referenced above includes applications for emergency requests for CBCFA benefits and services, which defendants are required to in the significantly shorter time period of 72 hours. *See infra*, P 185. Thus, using 30 days as the time frame defendants further masks defendants' negligence in cases where defendants may have exceeded the legally mandated time frame of only 72 hours. Tr. at 875:20-876:14.

The Quarterly Report issued by DASIS demonstrates that even using the mean number, benefits are frequently delivered in an untimely manner. For example, DASIS' own report reveals that on average, from submission of the completed application to issue the benefit or service, the Brownsville center takes 44.1 days for ongoing rent, and 60.7 days for rent increase requests. The Greenwood center takes 67.6 days for home establishment requests, 59.8 days for voluntary departure requests, and 41.1 days for clothing allotment requests. The IHSU Waverly center takes over 79 days for client share rent arrears requests. The Kingsbridge center takes 35.8 days for ongoing rent requests, and 71 days for voluntary departure requests. *See* Pl. Ex. 5C at 17, table 1, line 3 (last two columns); at 18, table 1, line 3 (last two columns); at 19, table 1, line 4 (last two columns); at 20, table 1, line 4 (last two columns); at 21, table 1, line 4 (last two columns); at 22, table 1, line 5 (last two columns); at 17, table 1, line 6 (last two columns); at 20, table 1, line 6 (last two columns).

Additionally, the QPR only reports averages for benefits that have issued and does not include in the average those applications for which a benefit has not yet issued. Tr. at 886: 5-10.

The Quarterly Report also only measures the average timeliness for eligible applications that are in fact approved. No data is reported regarding the timeliness of DASIS in rejecting applications. *See* generally Pl. Ex. 5C at 16-25.

Other than the QPR, City defendants do not report timeliness data that shows the length of time from when an application is made to when the benefit is issued.[10] Tr. at 708:2-15.

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[10] The Court notes that DASIS does apparently publish monthly reports that report on the number of requests made for emergency housing made and the number of placements made. However, no report was submitted into evidence and City defendants at trial admitted that DASIS does not track

City defendants admitted at trial that no audits or other system of verification exists with regard to this timeliness data. Tr. at 877:6-878:18.

The Court finds the foregoing facts credibly demonstrate systemic problems in DASIS' efficient and timely administration of benefits.

The DASIS Law

At the commencement of this litigation, members of the plaintiff class received publicly subsidized benefits through the Human Resources Administration's ("HRA") Division of AIDS Services ("DAS") and it Income Support /AIDS Services Program. Presumably in an attempt to expedite access to essential social services, DAS was restructured from 1995-1997. The case management system was eliminated. DAS and IS/AS were consolidated into the Division of AIDS Services and Income Support ("DASIS"), the department that currently facilitates the provision of public benefits and services to the plaintiff class. However, these changes did not operate to increase DASIS' efficacy and the New York City Council reviewed the issue in 1997.

Local Law 49, also known as the DASIS Law,[11] was passed by the City of New York in 1997. It mandates the provision

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the length of time, only the quantity of requests, referrals and placements -- which is significantly different from reporting timeliness. Tr. at 708:2-15.

[11] Local Law 49 is codified at § 21-126 *et seq.* of the New York City Administrative Code. The DASIS Law undid

of a broad range of benefits and services to people with AIDS or clinical/ symptomatic HIV illness. In addition, DASIS was formally established as the organization charged with ensuring persons with clinical/symptomatic HIV meaningful and equal access to public services and benefits. The DASIS Law was structured to codify the existence of DASIS and "provide access to benefits and services to [publicly subsidized benefits and service] to every person with clinical/symptomatic HIV illness ... or with AIDS ...." N.Y.City Admin. Code § 21-126. In addition to creating certain specific benefits in the form of nutrition and transportation allowances, the DASIS Law also requires DASIS to provide "intensive case management", with low case-manager-to-client ratios and specific timeliness requirements to provide meaningful and equal access to public benefits and services for its clients. *Id.*; § 21-127 and 21-128(c)(2). *See* Pl. Ex. 32 at 1, 3.

Deputy Commissioner Caldwell testified that DASIS was not fully in compliance with the legal requirements of the DASIS Law in either December 1997 or in June 1998, and is not today fully compliant with the DASIS Law. Tr. at 716:1-15, 21-22.

Deputy Commissioner Caldwell further admitted that, despite the mandates of the DASIS Law, DASIS does not

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much of the restructuring DASIS had undergone in the two years prior to its enactment: it restored a case management system which had been eliminated and established firm, comparatively low case manager-to-client ratios. *See* N.Y.C. Admin. Code § 21-127.

track the length of time required to process requests for many benefits and services, including those administered by the State; [12] the total number of persons placed in permanent housing; the average length of time to reopen cases closed; or the average length of time required to comply with fair hearing decisions. Tr. at 717:20-718:17, 718:22-719:5, 722:11-723:5, 725:25-726:2, 726:10-13, 729:21-25, 730:5-11.

Although DASIS intends to implement automation projects to fully automate its systems, the automation plans that should have been completed by the end of 1999 did not occur. No deadline was presented for when the automation will be complete; DASIS' quarterly report indicates that as of yet, bids have not been accepted for the project. Tr. at 741:25-742:4; Pl. Ex. 5C at 7.

Deputy Commissioner Caldwell also admitted that DASIS does not track whether receipts are issued when a benefit or service is requested. Tr. at 747:15-23, 749:5-7.

CONCLUSIONS OF LAW

I. Relevant Legal Standards

Declaratory Judgment

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[12] The Court notes that although Deputy Commissioner Caldwell did initially assert that DASIS could track this data with respect to housing, he later admitted that DASIS did not track the length of time from an initial request for supportive housing to submission of the completed application. Tr. at 720:12-721:6.

Plaintiffs seek a declaratory judgment as to the rights of the plaintiff class. This Court has the authority to render a declaratory judgment pursuant to *28 U.S.C. § 2201*(a), which states in pertinent part:

> In a case of actual controversy within its jurisdiction...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and to and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

Under established law, a court should issue a declaratory judgment where (1) the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, or (2) it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding. *See Continental Cas. Co. v. Coastal Savs. Bank,* 977 F.2d 734, 737 (2d Cir. 1992); *Broadview Chem. Corp. v. Loctite Corp.,* 417 F.2d 998, 1001 (2d Cir. 1969). If either prong of this test is met, the action must be entertained. *See id.* For the reasons stated below, the Court finds that both bases for the test used in Broadview are implicated in the case at bar and that a declaratory judgment is appropriate under each prong of the test.

Permanent Injunction

The standard for a permanent injunction is essentially the same as for a preliminary injunction, except that plaintiffs must actually succeed on the merits. *See Amoco Production Co. v. Village of Gambell,* 480 U.S. 531, 546 n.12, 94 L. Ed. 2d 542, 107 S. Ct. 1396 (1987); *Civic Association of* *the Deaf of New York City v. Giuliani*, 915 F. Supp. 622, 631 (S.D.N.Y. 1996). Accordingly, plaintiffs must show irreparable harm, and they must succeed on the merits. *See, e.g., Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990). For the reasons stated below, a permanent injunction will be entered in this case.[13]

Defendants contend a permanent injunction should not be entered because plaintiffs relied upon outdated evidence at trial. The Court finds no merit in this argument. Firstly, the vast majority of evidence upon which plaintiffs relied was quite contemporary. This included, for example, City defendants' own most recent quarterly performance data for the period October 1999 through December 1999. The contemporary evidence merely confirmed, moreover, the validity of plaintiffs' older evidence. Furthermore, defendants proffered no evidence or data to suggest that plaintiffs' evidence was somehow outdated or presently invalid.

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[13] This Court denied a preliminary injunction to plaintiffs at the commencement of this litigation, finding the likelihood of success on the merits was low. Furthermore, at the time, there were active political efforts to repair the problems DAS clients faced in accessing the agency. DAS was to undergo restructuring, and later was subject to a new charter in Local Law 49. The Court was optimistic about these developments, and believed the agency showed significant promise in achieving its mandate. However, many years later and faced with evidence that belies those expectations, the Court finds that plaintiffs' success on the merits is clearly warranted and that a permanent injunction is appropriate in this case.

Secondly, both non-expert and expert discovery closed over one year before trial.[14] It is the major disadvantage of civil litigation that the freshest and most probative evidence must be shelved through months, and even years, of discovery, before it faces review by the trier of fact and the trier of law. As one appellate court has explained, under analogous circumstances:

> Courts have always preferred to decide issues of public importance on the basis of a concrete and clear-cut record, with fresh evidence of current validity. But the evidence in a case may lose some of that freshness while running a endless gauntlet of litigation, particularly when judicial review follows several layers of administrative determination. This is such a case. In these circumstances, a court may still find that a party has few other opportunities for review, and that the case is presented in such a form that the lapse of time does not impede proper judicial determination of the merits.

Montgomery Environmental Coalition v. Costle, 207 U.S. App. D.C. 233, 646 F.2d 568, 573 (D.C. Cir. 1980); *See* also *Morel v. Giuliani*, 927 F. Supp. 622, 632 (S.D.N.Y. 1995)(noting that injunctive relief available where an issue is "capable of repetition, yet evading review"); *Brown v.*

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[14] Trial was then delayed as a result of settlement negotiations that, after several months, proved fruitless. Under such circumstances, it is understandable that some of the evidence will not be up to the minute.

Giuliani, 158 F.R.D. 251, 265 (E.D.N.Y. 1994). Such is the case here, particularly considering that plaintiffs' contemporary evidence buttresses plaintiffs' largely uncontested older evidence.

II. Federal Disability Claims

Plaintiffs' central claim in this lawsuit is that defendants have violated Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (the "ADA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (the "Rehab. Act"), and their implementing regulations. The ADA was enacted in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101. Title II of the ADA broadly provides: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504 of the Rehab. Act, enacted 17 years earlier, similarly provides: "No otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..." 29 U.S.C. § 794 (a).

As remedial statutes, both the ADA and the Rehab. Act must be broadly construed to effectuate their anti-discriminatory purpose. *See, e.g., Niece v. Fitzner,* 941 F. Supp. 1497, 1505 (E.D. Mich. 1996) ("It is a familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes. This broad construction is also applied to civil rights statutes. Accordingly, a broad construction is given to both the Rehabilitation Act and the ADA.") (citations and internal quotations omitted); *Civic Ass'n of the Deaf v. Giuliani,* 915 F. Supp. 622, 634 (S.D.N.Y. 1996).

The mandates of the ADA and the Rehab. Act are further elaborated in the implementing regulations promulgated by the Department of Justice ("DOJ") and the Department of Health and Human Services ("HHS"), respectively. These regulations "are entitled to controlling weight unless they are 'arbitrary, capricious or manifestly contrary to the statute.'"*Innovative Health Systems, Inc. v. City of White Plains,* 117 F.3d 37, 45 (2d Cir. 1997) (quoting *Chevron, U.S.A., Inc, v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)); accord *Chevron,* 467 U.S. at 844 ("Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."); *Bragdon v. Abbott,* 524 U.S. 624, 632, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998) ("The [Rehab.Act] regulations are of particular significance because, at the time, HEW [the original drafter] was the agency responsible for coordinating the implementation and enforcement of § 504.").

Although there are subtle differences between these disability acts, "the standards adopted by Title II of the ADA for State and local government services are generally the same as those required under section 504 of federally assisted programs and activities." 28 C.F.R. Pt. 35, App. A. In addition, the DOJ regulations provide that Title II "shall not be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. § 791) or the regulations issued by Federal agencies pursuant to that title." 28 C.F.R. § 35.103(a). Hence, "based upon the close relationship between the two acts, cases interpreting the Rehabilitation Act are considered persuasive authority for interpreting the ADA." *Tugg v. Towey, 864 F.Supp.* 1201, 1205 n.4 (S.D. Fla. 1994). Accord *Rodriguez v. City of New York,* 197 F.3d 611, 618 (2d Cir. 1999), pet. for cert. filed. No. 99-10163 (June 23, 2000). For these reasons, the Court will consider plaintiffs' ADA and Rehab Act claims together.

To establish a violation under the ADA, plaintiffs must demonstrate that (1) they are "qualified individual[s] with a disability"; (2) that the defendants are subject to the ADA; and (3) that plaintiffs were denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or were otherwise discriminated against by defendants, by reason of plaintiffs' disabilities. *See, e.g., Doe v. Pfrommer,* 148 F.3d 73, 82 (2d Cir. 1998); *Civic Ass'n*, 915 F. Supp. at 634 (S.D.N.Y. 1996). To establish a violation under the Rehab Act, plaintiffs must, in addition, establish that defendants receive federal funding. *See, e.g., Doe,* 148 F.3d at 82. In the instant matter, defendants admit that plaintiffs are qualified individuals with disabilities, that defendants receive federal funding, and that defendants are subject to both the ADA and the Rehab. Act. Defendants deny, however, that plaintiffs have been discriminated against as that concept is defined under the statutes and their implementing regulations.

The ADA and the Rehab. Act reflect the fact that discrimination against the disabled is often unintentional, the result of oversight and disregard rather than discriminatory animus. *See, e.g., Helen L. v. DiDario,* 46 F.3d 325, 335 (3d Cir. 1995) ("The ADA attempts to eliminate the effects of...'benign neglect,' 'apathy,' and 'indifference.'"); H.R. Rep. No. 101-485(II), at 29 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 310 ("Discrimination against people with disabilities results from actions or inactions that discriminate by effect as well as by intent or design."). Accordingly, "the prohibition of Title II applies to action that carries a discriminatory effect, regardless of the [government's] motive or intent." *Tyler v. City of Manhattan,* 857 F. Supp. 800, 817 (D. Kan. 1994)*; See, e.g., Helen L.,* 46 F.3d at 335 ("Because the ADA evolved from an attempt to remedy the effects of 'benign neglect' resulting from the 'invisibility' of the disabled, Congress could not have intended to limit the Act's protections and prohibitions to circumstances involving deliberate discrimination."); *Bravin v. Mount Sinai Medical Ctr.* 186 F.R.D. 293, 301, vacated in part, 58 F.Supp. 2d 269 (S.D.N.Y. 1999) ("In the context of the [Rehabilitation Act], intentional discrimination against the disabled does not require personal animosity or ill will.").

Consistent with these principles, in *Alexander v. Choate,* 469 U.S. 287, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985), the Supreme Court established that a public entity must do more than merely provide access to the benefits that it offers. Instead, "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers . . . ." *Id. at 301* (emphasis added); accord ADA Compliance Guide P 804 (Thompson Publ'g Group, Inc., 1990 and Supp. Dec. 1991) (The ADA "stress[es] the concept of equal opportunity, not merely equal treatment, to eliminate discrimination."). "To assure meaningful access," the Supreme Court explained, "reasonable accommodations in the grantee's program or benefit may have to be made." *Alexander, 469 U.S. at 301; See Dopico v. Goldschmidt,* 687 F.2d 644, 653 n.6 (2d Cir. 1982) ("Where the relief requested did not modify some integral aspect of a defendant's program, courts have ruled that section 504 does require efforts to make the program available to otherwise qualified handicapped persons."). The Supreme Court added that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Alexander, 469 U.S. at 296-297.*

The DOJ regulations that implement Title II of the ADA reflect these principles. *See* H.R. Rep. No. 101-485, pt. 2, at 84 (1990) ("It is . . . the Committee's intent that [Title II of the ADA] also be interpreted consistent with *Alexander v. Choate.*"); Mark C. Weber, Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, *36 Wm. and Mary L. Rev.* 1089, 1115 (1995) ("In the legislative history of Title II, the congressional committees held out *Choate* as the definitive interpretation of section 504 that it intended Title II to copy."). Indeed, three separate provisions of the DOJ regulations require public entities to provide disabled individuals with meaningful access to their programs, benefits, and services. First, Section 35.130(b)(1) of the regulations establishes that a public entity may not "provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others..."28 C.F.R. § 35.130(b)(1)(iii).[15] Second, a public entity may not "utilize criteria or methods of administration . . . that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability," or "that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities...." 28 C.F.R. § 35.130(b)(3)(i), (ii).[16] Third, under Section 35.130(b)(7), "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

Consequently, as the Second Circuit has observed, "it is not enough to open the door for the handicapped . . .; a ramp must be built so the door can be reached." *Dopico,* 687 F.2d at 652. Plaintiffs in this case contend that DASIS was created to serve as a reasonable accommodation to their disability, a "ramp," as it were, to assist them in accessing and maintaining the social welfare benefits and services to which they are entitled. Plaintiffs claim the "ramp" of DASIS is necessary under the ADA and the Rehab. Act to ensure them meaningful access to the benefits and services upon which they depend, and for which they are fully qualified. Without a fully functioning DASIS, plaintiffs argue, defendants cannot provide them with an "equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others," 28 C.F.R. § 35.130(b)(1)(iii); defendants cannot "accomplish[] the objectives of the public entity's program with respect to individuals with disabilities," 28 C.F.R. § 35.130(b)(3)(ii); and defendants will fail to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7).

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[15] The Rehab Act regulations similarly provide that a covered entity may not "provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others ..." 45 C.F.R. § 84.4(b)(1)(iii). Covered entities also "must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement..." 45 C.F.R. § 84.4(b)(2).

[16] For the analogous HHS regulation *See* 45 C.F.R. § 84.4(b)(4).

This Court previously held that DASIS is a reasonable modification to defendants' policies, practices, and procedures to ensure plaintiffs meaningful access to the benefits and services defendants provide. As this Court has explained:

> Public assistance is generally provided to eligible New Yorkers when they meet their periodic appointment schedules and verify their status in other ways. Frequently, this means waiting in long lines, and if they receive more than one type of benefit, it means doing so at several different locations. Given plaintiffs' disability and, in particular, the ease with which even minor

> infections can profoundly threaten their health, it is clear that defendants must provide Food Stamps, Home Relief, and other public assistance benefits in some modified fashion to these plaintiffs.

Henrietta D., 1996 U.S. Dist. LEXIS 22373, at *26. "The goal of DASIS," this Court has ruled, "at least in part, is to facilitate HIV-positive clients who are ill through the complex maze of social services that provide the variety of public assistance benefits to which plaintiffs are entitled." *Id.* Hence, "in its most basic, facilitory [sic] efforts, DASIS is a necessary modification to, and not a fundamental alteration of, the public assistance services that the City provides to all eligible New Yorkers." *Id.* Defendants, in fact, argued this at trial: "DASIS itself is a reasonable modification of the public assistance programs administered by HRA to all non-DASIS clients." Tr. at 647:14-16.[17]

In 1997, the New York City Council enacted, and Mayor Giuliani signed, Local Law 49 (the "DASIS Law"). N.Y. City Admin. Code §§ 21-126 *et seq.* The DASIS Law codified the existence of DASIS, reflecting this Court's ruling in 1996 that DASIS is a necessary modification to the public assistance programs that the City provides to all eligible New Yorkers. *See Henrietta D.*, 1996 U.S. Dist. LEXIS 22373, at *26. In addition to codifying DASIS' existence, the DASIS Law mandated that defendants provide many of the kinds of modifications that the instant plaintiffs have asserted to be necessary to fulfill defendants' obligations under federal law. For example, the DASIS Law requires: "intensive case management" services, *See* N.Y. City Admin. Code § 21-127; relatively low case manager-to-client ratios, in recognition of the special and complex needs of DASIS clients, *id.*; assistance "at a single location in order to apply for publicly subsidized benefits and services," including assistance at the home or "at a hospital where such applicant or recipient is a patient" (*See id.* § 21-127(a)(1)); and a "reasonable good faith search for at least a ninety-day period to locate the recipient" before terminating a client's benefits and services. *See Id.* § 21-127(f). Finally, the DASIS Law requires City defendants to track and report the timeliness of DASIS in approving clients' requests for, and in providing, all of the benefits and services that DASIS administers. *See Id.* § 21-1270).

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[17] Defendants provided no evidence that DASIS and its special functions represents a fundamental alteration of defendants' service, program, or activity. The reasonableness of the modifications that plaintiffs seek, moreover, is evidenced by the fact that virtually all are modifications that defendants have long purported - but failed - to provide, and that they are now required by local law to provide.

The DASIS Law provides important evidence of what a legislative body, in its wisdom, has deemed necessary to "ensure the provision of benefits and services to eligible persons...with clinical/symptomatic HIV illness or with AIDS." *Id.* at § 21-126. Thus, although the DASIS Law is not the basis of plaintiffs' claims in this matter, the fact that many, if not all, of the modifications that plaintiffs seek under the disability statutes are now required under local law provides powerful evidence that such modifications are reasonable, and that they certainly would not fundamentally alter the nature of defendants' programs. As this Court has previously held, "plaintiffs are not barred from satisfying their burden of proof on the elements of their federal law claims using definitions, obligations, and responsibilities found in state law. Plaintiffs may use state law . . . to prove that [defendants are] in violation of federal law." *Henrietta D. v. Giuliani,* 81 F.Supp. 2d 425, 431 (E.D.N.Y. 2000).

At this time, the Court finds that plaintiffs demonstrated at trial that the ramp that DASIS purports to be is broken, i.e., that defendants are failing to make the reasonable accommodations necessary to ensure plaintiffs meaningful access to, and an equal opportunity to benefit from, the social welfare benefits and services that defendants provide to eligible New York City residents. The extensive evidence proffered at trial -- from representative plaintiffs, from some of the City's largest providers of services to the plaintiff class, from expert testimony, and from the City's own performance-tracking reports -- establishes unequivocally that defendants are chronically and systematically failing to provide plaintiffs with meaningful access to critical subsistence benefits and services, with devastating consequences.

As the Supreme Court has explained, the failure to provide benefits

> may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn,

> adversely affects his ability to seek redress from the welfare bureaucracy.

Goldberg v. Kelly, 397 U.S. 254, 264, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970); *accord Morel v. Giuliani*, 927 F. Supp. 622, 635 (S.D.N.Y. 1994) ("To indigent persons, the loss of even a portion of subsistence benefits constitutes irreparable injury."); *Brown v. Giuliani*, 158 F.R.D. 251, 264 (E.D.N.Y. 1994) ("loss of even a small portion of welfare benefits can constitute irreparable injury"); *Willis v. Lascaris*, 499 F. Supp. 749, 760 (N.D.N.Y. 1980) ("The consequences of those mistakes in the social service arena, are more harmful than if they are made in other government programs because the ability of people to survive maybe jeopardized. In a just society, even a temporary undetermining [sic] of that ability is unacceptable and irreparable."). These problems are magnified for a person living not merely with HIV, but with clinical/symptomatic HIV illness and AIDS, as all of the instant plaintiffs do.[18]

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[18] Plaintiffs' expert witness, Dr. Tanya Zangaglia, testified that, owing to the danger of developing resistant strains of HIV, "it is absolutely imperative that people, once they commit to the relationship with their medication, they must continue that relationship over time . . . ." Tr. at 443. Dr. Zangaglia also testified that poverty and limited mobility can make it extremely difficult for persons living with AIDS to maintain their critical dietary restrictions, Tr. at 461; that stress can weaken plaintiffs' already weakened immune system, Tr. at 461; and that "the added stress of lack of housing, food, medical care, and other basic survival services and benefits poses a serous threat to [plaintiffs'] health." Tr. at 462. The Court will note that it

The evidence presented demonstrated an alarming failure to provide plaintiffs with the intensive case management and assistance that DASIS was intended to provide. In the unsatisfactory performance of these services, DASIS cannot ensure plaintiffs meaningful access to their subsistence benefits. *See Morel,* 927 F.Supp. at 635 (noting that degree of harm resulting from City's delay in restoring public assistance benefits "is made evident by the fact that most changes in benefits are reversed or withdrawn after a hearing.")

The plaintiffs, the community-based representatives, and defendants own data painted a picture of an agency that routinely fails to provide access, meaningful or otherwise, to its clients. DASIS' systemic failure to provide its clients with meaningful access to their benefits and services was also conclusively established through defendants' own quality assurance data. As noted, this data [19] tracks the timeliness of DASIS in providing certain benefits to eligible DASIS clients. The data demonstrates a widespread and highly disturbing inability of DASIS to provide critical benefits within the time frames mandated by law. For the agency overall, data for October-December, 1999 demonstrates that DASIS failed to provide eligible clients with a total of 10-different benefits within the legal time

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discredits portions of Dr. Zangaglia's testimony regarding her report, Pl. Ex. 13, finding that defendants effectively impeached her on those grounds.

[19] City defendants are required to compile this data pursuant to the DASIS Law.

frame 33% of the time. Even more disturbing, in some DASIS centers (notably the Amsterdam, Waverly, and Kingsbridge centers) DASIS failed to do so 45%, 44% and 44.6% of the time. *See* Pl. Exs. 202 and 203, at 1. In practical terms, this means that thousands of indigent New Yorkers living with AIDS stand an almost fifty-fifty chance of having their rights violated by this agency -- rights to critical subsistence benefits for which they have been determined fully eligible. It is noteworthy that these figures are based upon defendants' own data which, according to plaintiffs, may understate the extent of the problem.

In *Morel*, City defendants admitted to failing to provide timely aid continuing benefits to the plaintiff class in at least 10% of all eligible cases. *Morel,* 927 F.Supp. at 636. The court concluded, on this basis, that plaintiffs had demonstrated a likelihood of success on the merits of their claim and issued an injunction against the City and State defendants. *Id.* at 637; accord *Alexander v. Hill,* 707 F.2d 780, 784 (4th Cir. 1983)("The defendants' objection to the 100% applicability of the relief ordered, based on a claim that it is too Draconian, need not long detain us ... The law itself compels 100% compliance."); *Haskins v. Stanton,* 794 F.2d 1273, 1277 (7th Cir. 1986); *Robidoux v. Kitchel,* 876 F. Supp. 575 (D.Vt. 1995) (rejecting argument that failure rate of 6.5% to 10% in meeting 30-day limit was acceptable). As the court in Robidoux explained:

> [T]he law requires full compliance, absent a minimum of human error. But, even if the law required only substantial compliance, the Court must look to the nature of the interest at stake in determining what is "substantial." Here, the interest lies in the

> question of entitlement to subsistence-level benefits making the consequences of failure to comply quite serious ... Individuals deemed eligible for benefits need assistance quickly.

Robidoux, 876 F.Supp. at 579-80 (citations and internal quotations omitted). Here, plaintiffs have demonstrated a failure to provide timely subsistence benefits to the plaintiff class in at least 33% of all eligible cases, triple the rate on noncompliance in *Morel.* And again, this rate reaches 45% in some DASIS centers. *See* Pl. Ex. 203 at 1.

There are additional examples of this; using defendants' figures, the Waverly DASIS center took an average of 79 days from the date of a completed application for client share rental arrears to the issuance of the benefit. *See* Pl. Ex. 5C at 22. The applicable law requires that such benefits be provided no later than twenty business days following the submission of a completed application in non-emergency situations. *See* N.Y. City Admin. Code §§ 21-128(c)(2). Under State regulations, moreover, in emergency situations, such as when clients face eviction, DASIS must issue the benefits within 72 hours of the submission of a completed application. *See* N.Y. Dept. of Social Services Directives 86 ADM-7; *Hernandez v. Hammons,* 239 A.D.2d 192, 194, 657 N.Y.S.2d 170 (1st Dept. 1997) (observing that 86 ADM-7 imposes a 72-hour time frame for determining eligibility and awarding emergency benefits in cases of immediate need, "such as receipt of a notice of eviction or dispossession").

DASIS includes emergency cases with non-emergency cases in reporting overall time frames, *See supra*, P 119.

Because of this, the overall averages for delivery of all CBCFA benefits, including arrears cases, are artificially reduced, while DASIS' performance in emergency cases remains unreported. Conflating the emergency and non-emergency time frames serves only to mask the extent of DASIS' noncompliance. Furthermore, even evaluating the combined figures, the data establishes an egregious failure to meet the legal time frames with respect to a benefit critical to clients' housing situations; indeed, by any measure, 79 days is more than double the legal time frame.

Similarly, DASIS' own figures reveal that the Brownsville DASIS center took an average of 60.7 days from the date of a completed application for a rent increase to the issuance of the benefit. *See* Pl. Ex. 5C at 18. DASIS' figures reveal that the Greenwood DASIS center took an average of 59.8 days from the date of a completed application for a voluntary departure benefit to the issuance of the benefit, and the Kingsbridge DASIS center took an average of 71 days to issue this benefit to eligible DASIS clients. *See* Pl. Ex. 5C at 20. The applicable law requires that each of these benefits be provided no later than twenty business days following the submission of a completed application. *See* N.Y. City Admin. Code §§ 21-128(c)(2).

The QPR also demonstrates that City defendants are failing to provide intensive case management and are in violation of their own mandate with regard to case manager/supervisor-to-client ratios. Pursuant to the DASIS Law, DASIS is required to provide plaintiffs with "intensive case management with an average ratio which shall not exceed one caseworker or supervisor to twenty-five family cases, and with an overall average ratio for all cases which shall not exceed one caseworker or supervisor to thirty-four cases." N.Y. City Admin. Code § 21-127(i). The QPR reports that in the Kingsbridge DASIS center, there are total of 4,403 cases and only 96 case managers and supervisors. *See* Pl. Ex. 5C at 10, 28. This represents a case load ratio of 45.9 to 1. Similarly in the Bergen DASIS center, there are a total of 3,519 cases and a total of 79 case managers and supervisors, yielding a case load ratio of 44.5 to 1. *See* Pl. Ex. 5C at 10, 28. Hence, DASIS' own figures establish that in some parts of New York City, city defendants are violating the maximum ratios established by a legislative body "to ensure the provision of benefits and services" to plaintiffs. N.Y.City Admin. Code § 21-126. This evidence supports the testimony of class members and representatives of community-based organizations that DASIS case managers are unresponsive to plaintiffs' needs, unable to provide them the intensive case management they require, and unable to ensure them meaningful access to their subsistence benefits and services.[20]

The evidence that plaintiffs proffered stands in stark contrast to the conspicuous lack of evidence presented by defendants. Although plaintiffs at all times bear the burden of proof, the Court will acknowledge a noticeable lack of counter-evidence at the end of five years of litigation. In this time, the only data that defendants have compiled, produced by City defendants literally on the eve of trial, helps to establish their systemic failure to provide plaintiffs with timely access to critical subsistence benefits.[21]

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[20] Low case manager-to-client ratios are a reasonable modification that plaintiffs have urged as necessary under federal law to ensure them "meaningful and equal access to HRA benefits and services" from the beginning of this case-fully two years before The DASIS Law was enacted. *See* Second Am. Compl. P49 (Mar. 25, 1995). The fact that a legislative body subsequently mandated compliance with such ratios in light of the disability provides strong evidence of the reasonableness of the relief that plaintiffs seek.

Finally, City defendants raised two inaccurate legal arguments that merit brief examination here. First, City defendants suggested that plaintiffs seek additional benefits, or better benefits, than the non-disabled receive, which the law does not compel. *See* Tr. at 646-650. Defendants repeatedly emphasize the nutritional and transportation allowance, which only DASIS clients receive, while ignoring the vast majority of benefits and services that plaintiffs receive which are precisely the same as those received by the non-disabled.[22] This Court has rejected this argument twice, in two separate decisions. *See Henrietta D. v. Giuliani,* 81 F. Supp. 2d 425, 432 (E.D.N.Y. 2000) ("Plaintiffs do not challenge the amount or adequacy of the benefits available to them; they seek equal and meaningful access to benefits already available to them."); *Henrietta D. v. Giuliani,* 1996 U.S. Dist. LEXIS 22373, 95 CV 0641 (E.D.N.Y. Oct. 25, 1996). Plaintiffs have made no claim under the ADA or the Rehab. Act for additional or better benefits and services than provided to the non-disabled. To the contrary, plaintiffs' ADA and Rehab Act claims seek meaningful access to the very same benefits and services provided to the non-disabled. Plaintiffs seek, and this Court requires, only the modifications -- such as intensive case management and low case manager-to-client ratios -- required to ensure meaningful access to the same benefits and services.

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[21] Plaintiffs' expert Dr. Ernest Drucker conducted a discrete study in 1998 in which he concluded that defendants failed to provide DASIS clients with one benefit - enhanced rental assistance - within the legally-mandated time in 77% of the cases studied. Defendants did not proffer any evidence to dispute this study, and their own data, introduced at trial, confirmed that, for the last quarter of 1999, DASIS failed timely to provide this benefit to all eligible DASIS clients 32% of the time, by DASIS' own figures.

[22] The Court will not that nutritional supplements and transportation allowances act as reasonable modifications allowing persons with AIDS and HIV access to their benefits, not as benefits additional to those received by the non-disabled public.

Second, City defendants argued that plaintiffs must show disparate treatment to prevail, asserting that "the law is a comparison between what they are getting and what the non-disabled population is getting . . ." Tr. at 650:22-24. This is incorrect. Once it is determined that the underlying benefits are provided to all, the only remaining question is whether defendants have made the reasonable accommodations required to ensure plaintiffs meaningful access to those benefits. *Alexander v. Choate,* 469 U.S. 287, 301, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985).

The reasonable accommodation concept embodied in the federal disability statutes is meant to address the unique hurdles that people with disabilities face, and it recognizes that mere equality of treatment is not enough. *See, e.g., Dopico, 687 F.2d at 652* ("It is not enough to open the door for the handicapped...; a ramp must be built so the door can be reached."); *Marisol A. v. Giuliani,* 929 F. Supp. 662, 685 (S.D.N.Y. 1996), aff'd *126 F.3d 372 (2nd Cir. 1997)* ("[A] disabled individual is entitled to meaningful access to the benefits and services provided by a public agency . . . . Access alone . . . is insufficient. Rather, a court may require an agency, under certain circumstances, to take affirmative steps to ensure that the access is meaningful."); 45 C.F. R. Pt. 84, App. A, at 336 (1997) ("In order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary.").[23]

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[23] As Robert L. Burgdorf Jr., leading scholar on the Americans With Disabilities Act and author of the ADA bill submitted to Congress in 1988, explains:

> Identical treatment of people with and without disabilities, however, cannot address many of the dynamics that cause this type of discrimination. To say that everyone is treated equally is not an answer to the obstacle posed by a flight of stairs to many people with disabilities . . . . In fact, the Supreme Court of Washington has articulated that "identical treatment may be a source of discrimination." An identical treatment approach in regard to disabilities gives "the form, but not the substance, of equal opportunity."

Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment*

Quite simply, plaintiffs' claim is based upon defendants' failure to provide them reasonable accommodations, and not upon disparate treatment. Plaintiffs have alleged, and demonstrated, that defendants have failed to provide them with the reasonable accommodations required by the federal disability statutes, thus failing to ensure them meaningful access to the benefits to which they are entitled. A comparison with the manner in which benefits are administered to the non-disabled is thus not required, for the question of equality of administration is irrelevant to a claim for reasonable accommodations. This is, in fact, a well-established distinction. *See, e.g., Bultemeyer v. Fort Wayne Community Schools,* 100 F.3d 1281, 1283 (7th Cir. 1996) ("This is not a disparate treatment claim, but a reasonable accommodation claim, and it must be analyzed differently. [Plaintiff] is not complaining that [defendant] treated him differently and less favorably than other, non-disabled employees. *He is not comparing his treatment to that of any other [of defendant's] employees*. His complaint relates solely to defendant's failure to reasonably accommodate his disability.") (emphasis added)[24]; *Aka v.*

Model and Misconstructions of the Definition of Disability, 42 Vill. L. Rev. 409, 524-25 (1997) (citation omitted).

[24] The reasonable accommodation/modification requirement, upon which this case is based, is embodied in, and thus equally applicable to, all three Titles of the ADA, as these cases suggest.. This includes Title 11, which requires: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability . . . ." 28 C.F.R. § 35.130(b)(7).

Washington Hosp. Ctr., 332 U.S. App. D.C. 256, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (noting that reasonable accommodation claims rely on legal standards distinct from disparate treatment claims); *Cathcart v. Flagstar Corp.*, 1998 U.S. App. LEXIS 14496, at *27, No. 97-1977 (4th Cir. 1998) ("Discrimination as used in the ADA prohibits not only disparate treatment ... but also the failure to make 'reasonable accommodations to the known physical or mental limitations of . . . an applicant or employee.'") (citations omitted); *Franklin v. Consolidated Edison Co. of N.Y.*, 1999 U.S. Dist. LEXIS 15582, at *27, 98 Civ. 2286 (S.D.N.Y. Sept. 30, 1999); *Dunlap v. Association of Bay Area Gov'ts,* 996 F.Supp. 962, 965 (N.D. Cal. 1998) ("A disability discrimination claim may be brought either on the theory that defendant failed to make reasonable accommodations or on a more conventional disparate treatment theory, or both. This is because the ADA not only protects against disparate treatment it also creates an affirmative duty in some circumstances to provide special, preferred treatment, or 'reasonable accommodation.'"); *Matthews v. Jefferson,* 29 F.Supp. 2d 525 (W.D. Ark. 1998); *Connus v. Bethesda House Corp.*, 1997 U.S. Dist. LEXIS 9586, at *7, No. 96-7081 (E.D. Pa. 1997) (Plaintiff can establish a claim under ADA "in one of the two ways established by the ADA," including disparate treatment and failure to provide a reasonable accommodation for his disability); *Mohamed v. Marriott Internat'l, Inc.*, 905 F. Supp. 141, 150-54 (S.D.N.Y. 1995).[25]

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[25] As the court in Matthews explained:

> The statute's language demonstrates a recognition by Congress that discrimination against persons with disabilities differs from

Hence, defendants' failure to provide the reasonable modifications that plaintiffs require, without more, constitutes discrimination under the federal disability statutes. *See, e.g., Bultemeyer,* 100 F.3d at 1283 ("If it is true that [defendant] should have reasonably accommodated [plaintiffs] disability and did not, [defendant] has discriminated against him."); *Dunlap,* 996 F.Supp. at 966 ("The failure reasonably to accommodate, without more, constitutes 'discrimination' within the meaning of the ADA.") (citation omitted).

> discrimination on the basis of, for example, gender or race. Discrimination in the latter instances has been judicially defined as disparate treatment on the basis of a certain characteristic that identifies an individual as a member of a protected class. However, a person with a disability may be the victim of discrimination precisely because she did not receive disparate treatment when she need accommodation. In the context of disability, therefore, equal treatment may not beget equality, and facially neutral policies may be, in fact, discriminatory if their effect is to keep persons with disabilities from enjoying the benefits or services that, by law, must be available to them.

29 F.Supp. 2d at 532 (citation and internal quotations omitted).

Plaintiffs have proffered extensive evidence that they have been denied meaningful access to critical subsistence benefits, in contravention of the law. Plaintiffs' evidence reveals an institution--DASIS--that is chronically and systematically unable to fulfill its function of providing plaintiffs with a "ramp" to the benefits and services essential to their survival. *See, e.g., Brown v. Giuliani,* 158 F.R.D. 251, 265 (E.D.N.Y. 1994) ("For plaintiffs and members of the plaintiff class, public assistance benefits are the essential source of support that permit them to survive.") As a result, plaintiffs have suffered and continue to suffer grave and irreparable harm, and they face imminent risk to their health, safety, and lives. *See, e.g., Reynolds v. Giuliani,* 35 F. Supp. 2d 331, 340, modified in part 43 F.Supp. 2d 492 (S.D.N.Y. 1999) (issuing injunction and noting, "The City defendants' practices continue to endanger numerous individuals in need of public assistance, including ... the disabled.") Under such circumstances, the issuance of an injunction is necessary and proper. *See, e.g., Brown,* 158 F.R.D. at 268 ("Where the standards for a preliminary injunction are met, it is this Court's obligation to enjoin actions of a governmental body which are in violation of the law.").

III. Federal Benefits Claims

Defendants have repeatedly violated clear requirements regarding the provision of Medicaid and Food Stamps. The first such requirement is that welfare benefits may only be terminated with notice and with good reason. *See* 42 C.F.R. § 435.919 (Medicaid notice); 7 C.F.R. § 273.13 (Food Stamps notice); C.F.R. § 435.913(a) (inability to explain ineligibility for Medicaid). However, DASIS regularly terminated Medicaid and Food Stamps benefits without notice and without reason. For example, in 1994, 1995, 1996, and 1999, Mr. Bradley's Food Stamps and Medicaid were terminated five times without notice as subsequently determined by a fair hearing. *See supra*, PP 15, 17, 20, 22, 34. In 1998, Mr. Bradley finally received notice prior to a termination of benefits, but the notice was incomprehensible, citing a numerical reason that no one at DASIS was able to explain. *See* 42 C.F.R. 435.919 (Medicaid notice must comply with 42 C.F.R. § 431.210); 7 C.F.R. § 273.13 (Food Stamp notice must be in "easily understandable language"). *See supra*, P 31. Once more, DASIS' decision was overturned. Similarly, DASIS terminated Mr. Greene's benefits without notice in November 1998 as determined in a subsequent fair hearing. *See supra*, P 50. DASIS closed Mr. Torres' case in 1998 and again in April 1999. *See supra*, PP 62, 63. Both witnesses from community based organizations testified that closures without notice or explanation are frequent. (*See supra*, PP 86, 99.

Defendants also violated the requirement that, pending the outcome of a fair hearing, continuing aid and emergency Medicaid must be provided. *See* 42 C.F.R. § 435.930; N.Y. Soc. Serv. Law § 133. Again, the handling of Mr. Bradley's case exemplifies DASIS' gross failure. Mr. Bradley received absolutely no assistance from defendants while awaiting his successful fair hearings. *See supra*, PP 15, 18, 21.

Moreover, City defendant has failed to abide by fair hearing decisions and State defendant has failed to timely ensure compliance. On September 8, 1998, defendants were ordered to reinstate Mr. Bradley's Medicaid and Food Stamps and to grant retroactive Food Stamps. *See supra*, PP 30-32. Similarly, both witnesses from community based organizations testified that DASIS often-even in a majority of cases-fails to comply with fair hearing decisions for months or even over a year. *See supra*, PP 87, 100-102, 105.

Also, defendants have an obligation to effectively administer Food Stamp and Medicaid programs. *See* 42 C.F.R. § 435.930 ("The [state] agency must . . . continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible . . . ; 7 C.F.R. § 276.1(a)(4) ("State agencies shall be responsible for efficiently and effectively administering the [Food Stamp] Program . . . ."). This duty obviously requires that eligible individuals receive benefits from the programs. As both Mr. Bradley and Mr. Greene's cases demonstrate, defendants fail at this most basic level because eligible recipients regularly have Medicaid and Food Stamp benefits terminated without cause or effective recourse. *See supra*, PP 20, 22, 27, 29, 31, 35, 50.

Thus, the Court finds that defendants have violated Federal law governing Medicaid and Food Stamps, as well as New York State Social Services law and regulations that implement these Federal programs, through consistent disregard of statutes protecting welfare benefits.

The failure of DASIS to provide notice to their clients about the termination of their cases violates the due process guarantees of the Fourteenth Amendment. Since *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), the law has recognized a person's interest in welfare benefits is a protected property interest. *Id.* at 261-262. The Supreme Court held that the when welfare benefits are discontinued, "only a pre-termination evidentiary hearing provides the recipient with procedural due process." *Id.* at 264. Further, the recipient must have "timely and adequate notice detailing the reasons for a proposed termination." *Id.* at 267-268. *See also Ford v. Shalala,* 87 F. Supp. 2d 163, 175-176. (E.D.N.Y. 1999); *Richardson v. Kelaher,* 1998 U.S. Dist. LEXIS 18287, 1998 WL 812042 at *4-6 (S.D.N.Y. Nov. 19, 1998).

The evidence adduced at trial demonstrates that not only has DASIS failed to give "timely and adequate notice," but that DASIS has repeatedly failed to give any notice whatsoever to their clients when their cases are closed and their benefits terminated. For example, in July 1996, Mr. Bradley won a fair hearing which ordered DASIS to restore his benefits. However, in September 1996, DASIS complied with the decision for only one day, and then closed the case without notice to Mr. Bradley the very next day. *See supra*, P 22. Following subsequent reopenings of the case, Mr. Bradley's case was again closed without notice in May 1999. *See supra*, P 34. DASIS closed Mr. Greene's case without notice in September 1998, and he only discovered this two months after the fact. *See supra*, P 50. Mr. Torres was only informed that his case had been closed in December 1998, almost a year after the fact. In January 1998, March 1998, August 1998, and September 1998, Mr. Torres directly contacted DASIS in connection with his application for permanent housing, but at no point during these meetings or at any time prior to December 1998 was Mr. Torres informed that his case had been closed. *See supra*, PP 57-62. DASIS again closed Mr. Torres' case in April 1999 without any notice. *See supra*, P 63. Ms. Knox testified that she "had many, many cases where clients' cases have been terminated and they [the clients] had not been given notice." Tr. at 515: 4-6. Ms. Bowman testified that in her estimation, "about thirty percent of the cases that I see, the clients have no idea why their case was closed." Tr. at 555:22-23. defendants have violated and continue to violate the due process rights of plaintiffs.[26]

Each time that DASIS terminated a class member's benefits without notice, and in violation of the due process clause, the nutrition and transportation supplement was among the benefits wrongfully terminated. Indeed, DASIS wrongfully terminated Mr. Bradley's benefits without notice, including the nutrition and transportation supplement, on numerous occasions. Mr. Bradley testified, moreover, that even after he won a fair hearing ordering DASIS to restore his lost benefits, DASIS failed to pay him the nutrition and transportation supplement. (*See supra*, P 30.) Mr. Torres testified that he never received the nutrition and transportation supplement from DASIS. (*See supra*, P 64.)

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[26] The due process clause of the New York Constitution also provides: "No person shall be deprived of life liberty or property without due process of law." N.Y. Const. Art. I, § 6. The clause is given similar meaning as the Fifth and Fourteenth Amendments of the United States Constitution, and therefore any due process violation under the Federal standard violates the State constitution. Cf. *Metropolitan Life Ins. Co. v. N.Y. State Labor Relations Bd.,* 280 N.Y. 194, 20 N.E.2d 390 (1939) ("Due process for us is the same due process to which the Federal Congress is subject..."); 20 N.Y.Jur.2d § 387 ("The impact of the [due process] provisions is the same ....") Accordingly, defendants are also in violation of the state constitution.

And Ms. Lafontaine testified that although she was accepted as a DASIS client in January 1999, DASIS failed to inform her of her right to receive the nutrition and transportation supplement, or to provide her with the supplement until November 16, 1999. *See supra*, P 68. DASIS has failed and continues to fail to provide this benefit to eligible recipients.

State Defendant Liability

As this Court has previously ruled, under New York State law, State defendant has a duty to supervise City defendants in the provision of public benefits and services. *See Henrietta D.*, 81 F.Supp. 2d at 433. Indeed, in the administration of public assistance funds, "'the local commissioners act on behalf of and as agents for the State.'" *Id.* (quoting *Matter of Beaudoin v. Toia,* 45 N.Y.2d 343, 380 N.E.2d 246, 247, 408 N.Y.S.2d 417 (N.Y. 1978)). Hence, if City defendants have violated plaintiffs' rights under the federal disability statutes, then State defendant, as City defendants' principal, and as their supervisor, is also liable. *See, e.g., Brown v. Giuliani,* 158 F.R.D. 251, 256 (E.D.N.Y. 1994); *Morel v. Giuliani,* 927 F. Supp. 622, 627 (S.D.N.Y. 1995).

In the summary judgment decision, this Court noted that "the State has not come forward with evidence of reasonable modifications made with the intent to insure equal and meaningful access to the provision of services for people with AIDS." 81 F.Supp. 2d at 433. At trial, State defendant failed to proffer any evidence to controvert plaintiffs' proof, or to demonstrate State defendant's efforts at ensuring compliance with the federal disability statutes, but argued that the very presence of a fair hearing system suffices to fulfill State defendant's duty to supervise City defendants. Tr. at 652:16-17. This argument fails for several reasons.

First, City defendants' ongoing, systemic violations of the law demonstrate that State defendant has failed properly to supervise City defendants. As City defendants' principal, moreover, State defendant is liable for the actions of its agents, City defendants. Second, as discussed above, the evidence adduced at trial -- from the individual witnesses, from representatives of community-based organizations, and from City defendants' own witness -- demonstrate that the fair hearing mechanism has been wholly ineffective in assuring meaningful access to the benefits and services for which plaintiffs are fully eligible. Even where plaintiffs prevail at fair hearings, the evidence shows that City defendants often delay compliance with the courts' directives or ignore the decisions altogether. *See supra*, PP 19, 21-24, 87, 100-102.

Third, State defendant provided no evidence to demonstrate that the fair hearing process is available to challenge many of the problems plaintiffs face, including DASIS' lack of responsiveness, its failure to comply with legal deadlines, and its failure to provide intensive case management services.[27] Finally, desperately ill and impoverished clients should not be forced to pursue legal recourse each time their rights are violated. Proper supervision means, at the very least, ensuring that the widespread violations evidenced at trial, which give rise to the fair hearings, do not occur in the first place. The fact that fair hearings are available in some circumstances is thus no defense to a claim of systemic and widespread violations of plaintiffs' rights. Accordingly, State defendant is liable under the federal disability acts.

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[27] The claims in this case under the disability acts are in no way precluded because a local statute requires DASIS to provide intensive case management with respect to all of the benefits and services that DASIS administers. Indeed, plaintiffs have argued that this modification is necessary under both the ADA and the Rehab. Act from the inception of this case. (*See* Second Am. Compl., P3-4, dated March

IV. State Law Claims

Article XVII of the New York State Constitution

Section 1 of Article XVII of the New York State Constitution provides: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.[28] As the New York Court of Appeals has

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25, 1995.) The choice by the New York City Council to codify this requirement for DASIS clients after the inception of this case forcefully supports the claim that this is a reasonable, and necessary, modification.

[28] Additionally, Section 3 of Article XVII provides: "The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature may from time to time determine."

explained, "in New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution." *Tucker v. Toia,* 43 N.Y.2d 1, 7, 371 N.E.2d 449, 451, 400 N.Y.S.2d 728 (1977). Section 1 of Article XVII, the Court further explained, was adopted "in the aftermath of the great depression," and "it was intended as an expression of a positive duty upon the State to aid the needy." *Id.* Hence, the New York State Constitution "imposes upon the State an affirmative duty to aid the needy," and "such a definite constitutional mandate cannot be ignored or easily evaded in either its letter or its spirit." *Tucker, 371 N.E.2d at 452;* accord *Lee v. Smith,* 43 N.Y.2d 453, 373 N.E.2d 247, 250, 402 N.Y.S.2d 351 (N.Y. 1977); *Wilkins v. Perales,* 128 Misc. 2d 265, 268, 487 N.Y.S.2d 961, 964 (N.Y. Sup. Ct. 1985), aff'd 119 A.D.2d 1018, 501 N.Y.S.2d 549 (1st Dept. 1986). Finally, the New York Court of Appeals has held that where "existing conditions violate an individual's constitutional rights," defendants cannot argue that the failure to alter those conditions is justified by lack of staff or facilities. *Klostermann v. Cuomo,* 61 N.Y.2d 525, 463 N.E.2d 588, 594, 475 N.Y.S.2d 247 (1984); *See Doe v. Dinkins,* 192 A.D.2d 270, 276, 600 N.Y.S.2d 939, 943 (1st Dept. 1993) ("The plaintiffs seek to have the municipal defendants comply with their statutory and constitutional obligations. Any inconvenience caused by compliance is outweighed by the harm which would be suffered otherwise.").

Plaintiffs in this case are all residents of the State of New York and are entitled to the protections of its Constitution. N.Y. Const. Art. 1, § 1. All of the plaintiffs require public assistance and have thus been classified as "needy" by the State Legislature. *See* N.Y. Soc. Serv. Law §§ 62, 131.

defendants, in turn, are responsible for ensuring that the State fulfills its constitutional obligations to provide for the needy through the provision of federal, state, and local programs to assist the needy. The evidence adduced at trial demonstrates that defendants are failing to fulfill their duty. The widespread and systemic failure to provide plaintiffs with meaningful access to critical subsistence benefits, detailed above, evidences an alarming failure to provide for the needy -- indeed, for some of the neediest of New York's residents. As one court has explained:

> [T]he Constitution of the State of New York and statutes enacted pursuant to it make each New Yorker the beneficiary of a right not to be hungry, unclothed, or homeless. To the extent that residents of the State *are* hungry, unclothed, or homeless, then the governmental authorities are falling short of their obligations.

Davis v. Perales, 137 Misc. 2d 649, 520 N.Y.S.2d 925, 928 (N.Y. Sup. Ct. 1987). Here, the City and the State are falling short of their obligations in all of these categories. Defendants' failure properly to assist plaintiffs in accessing and maintaining their food stamps and public assistance benefits, and defendants' failure properly to budget clients' benefits has caused, and threatens further to cause, plaintiffs to go hungry. *See supra*, P18, 85, 98. Defendants' own figures, moreover, demonstrate a systematic failure to provide plaintiffs with the clothing allotments to which they are entitled. Indeed, in the Greenwood center, for the last quarter of 1999, DASIS took an average of over forty days from the date of completed application to provide eligible applicants with a clothing allotment, a crucial benefit for those who have been ravaged by AIDS. *See* Pl. Ex. 5C at 21. The applicable law requires that such benefits be provided no later than twenty business days following the submission of a completed application. *See* N.Y. City Admin. Code §§ 21-128(c)(2). DASIS' own figures thus establish that DASIS is failing to comply with the law as a matter of course, placing its clients at imminent risk of going "unclothed." *See Davis,* 520 N.Y.S.2d at 928.

Finally, DASIS' failure timely to provide eligible clients with rental arrears in compliance with the law threatens plaintiffs' housing situations. As noted, by defendants' own figures, the Waverly DASIS center took an average of seventy-nine days from the date of a completed application for client share rental arrears to the issuance of the benefit. *See* Pl. Ex. 5C at 22; *See* discussion *supra*. This is compounded by DASIS' failure to assist clients in locating permanent housing, as attested by both clients (this includes Mr. Bradley, Mr. Torres, and Ms. Lafontaine), and by community-based witnesses. *See supra*, PP 20, 57-62, 69, 71, 81, 95-96. Finally, this is compounded by DASIS' failure timely to provide rent on new apartments for eligible clients, system-wide, 32% of the time, by DASIS' own figures. *See* Pl. Ex. 203 at 2. To take one example, Mr. Torres was homeless when he located an apartment in Coney Island, Brooklyn. He submitted an application and the requisite documentation for this apartment to his DASIS case manager. DASIS took two months to process his application. Mr. Torres lost the apartment and was forced to remain homeless. *See supra*, P 57.

For the foregoing reasons, this Court finds that defendants have violated plaintiffs' rights under the New York State Constitution.

NYCRR Title 18, Section 303.1

Title 18, Section 303.1 of the New York City Rules and Regulations provides, in relevant part: "No social services district or official shall establish or apply any policy or practice which would have the effect of discriminating against an individual because of . . . handicap. This prohibition shall apply to all aid, care, services, benefits or privileges provided directly, or indirectly..." 18 N.Y.C.R.R. § 303.1(a). This statute also provides, in relevant part:

> In the provision of public assistance...no social services district or any member of its staff shall, on the basis of...handicap: (1) deny an individual any aid, care, services, other benefits or privileges provided by the district; . . . (4) restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any aid, care, services, other benefits or privileges;...(6) deny any individual an opportunity to participate in a program through the provision of services...

18 N.Y.C.R.R. § 303.1(b)(1), (4), (6). Finally, Section 303.7 of the statute provides that "the term handicap includes being diagnosed as having AIDS, testing positive for HIV infection, or being perceived as susceptible to AIDS or HIV infection." 18 N.Y.C.R.R. § 303.7.

Owing to the similarities in language and purpose between the federal disability acts and anti-discrimination provisions of the New York City Rules and Regulations, violation of plaintiffs' rights under the former is sufficient to constitute a violation of plaintiffs' rights under the latter. Therefore, this Court finds that City defendants have violated plaintiffs' rights under Title 18, Section 303.1 of the New York City Rules and Regulations.

Other State Law Claims

Application for Assistance. The New York Social Services Law requires that when City Defendants receive an application for assistance, they investigate the circumstances of the applicant to determine the assistance or care that the applicant requires. N.Y. Soc. Serv. Law § 132. The law requires that "all applications [for public assistance] shall be processed promptly." 18 N.Y.C.R.R. § 351.8.

Immediate Need. The New York Social Services Law requires that "If it shall appear that a person is in immediate need, temporary assistance or care shall be granted pending completion of an investigation." N.Y.Soc. Serv. Law. § 133.

Emergency Assistance. The New York Social Services Law requires that "each social services district shall furnish emergency assistance to aged, blind and disabled persons eligible therefor who reside in such district." N.Y. Soc. Serv. Law § 301. Emergency assistance shall be granted to a disabled person who applies for such assistance and who has needs that cannot be met by the monthly SSI benefit or other specified resources and that, "if not met, would endanger the health, welfare or safety of the individual." N.Y.Soc. Serv. Law § 302. Such needs are, among other things, replacement or repair of clothing, furniture, food, fuel and shelter. N.Y. Soc. Serv. Law § 303. New York Rules and Regulations similarly requires the provision of emergency assistance to eligible disabled persons with emergency needs, including, e.g., replacement or repair of clothing, furniture, food, fuel and shelter; household moving expenses; rent security deposits; and brokers' fees. 18 N.Y.C.R.R. § 397.1.

The evidence adduced at trial demonstrates that City defendants are in violation of these provisions. Data from City defendants' own database demonstrates that City Defendant systemically violate the requirement that "all applications shall be processed promptly." 18 N.Y.C.R.R. § 351.8.

Moreover, the representative class members demonstrated that when they clearly had immediate needs, City defendants failed to provide them with temporary assistance, in violation of Section 133 of the New York Social Services Law. For example, Mr. Bradley was constantly in immediate need of assistance in several categories. Repeatedly, and for prolonged periods of time, Mr. Bradley was in immediate need of assistance with his Medicaid, Food Stamps, rent, utilities, and cash assistance. DASIS failed to assist him on each occasion, forcing Mr. Bradley each time to pursue the long and arduous route of seeking a fair hearing to compel the restoration of his benefits. *See supra*, P 18-19, 21-22. To take another example, Ms. Lafontaine was deprived of her Food Stamps for two months. *See supra*, P 72. When Ms. Lafontaine asked her DASIS case manager for assistance, her case manager failed to provide her with temporary assistance, informing Ms. Lafontaine that "she couldn't do anything because the food stamps come from Albany." *Id.*

Finally, City defendants have failed to provide Plaintiffs with emergency assistance within the legal time frames. Under state regulations and New York law, DASIS must make an eligibility determination with regard to emergency benefits within 48 hours of the submission of a completed application, and must issue the benefits within 72 hours of the submission. *See* N.Y. Dept. of Soc. Serv. Directives 86 ADM-7; *Hernandez v. Hammons,* 239 A.D.2d 192, 194, 657 N.Y.S.2d 170 (1st Dept. 1997) (observing that 86 ADM-7 imposes a 48-hour/72-hour time frame for determining eligibility and awarding emergency benefits). As noted, DASIS fails to separate emergency applications form non-emergency application for approving and providing such benefits as rental arrears, home establishment, and clothing allotments. *See* Pl. Ex. 5C at 16-25. The evidence adduced at trial, however, demonstrates that City Defendants fail to provide all such benefits within thirty days, system-wide, in 33% of all cases. *See* Pl. Ex. 203 at 1. This figure includes emergency applications, Tr. 875-76, suggesting that DASIS is also in violation of the legally mandated 72-hour time frame in providing plaintiffs with emergency benefits.

V. Attorneys Fees

Plaintiffs have sought attorney's fees and costs in this action. Second Am. Compl. at 55. Both the ADA and the Rehab Act expressly permit a court to award attorney's fees and costs to a prevailing party. *See* 42 U.S.C. § 12205; 29 U.S.C. § 794a(b). Having prevailed in this case of public significance, plaintiffs will be awarded attorney's fees and costs. This matter is hereby referred to the Magistrate for a report and recommendation as to the amount of attorneys' fees that is reasonable in this case.

REMEDIES

In accordance with the Findings of Fact and Conclusions of Law filed herein, it is this 18th day of September, 2000:

ORDERED, ADJUDGED, AND DECLARED as follows:

c. Pursuant to 28 U.S.C. §§ 2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure, this Court declares that City Defendants have violated Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* and its implementing regulations; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and its implementing regulations; 42 U.S.C. §§ 1396(a)(8), (a)(19), and 460.2(a), 42 C.F.R. §§ 435.911(a) and (b), and 7 C.F.R. § 273.2, and 42 C.F.R. § 206.10(a)(i); New York State Social Services Law and implementing regulations and administrative directives; the Due Process clause of the New York State and United States Constitutions; and Article XVII, Sections 1 and 3 of the New York State Constitution.

d. Pursuant to 28 U.S.C. §§ 2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure the State Defendant has violated Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* and its implementing regulations and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and its implementing regulations;

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that

e. This Court retains full jurisdiction over compliance with this judgment.

f. This Court shall appoint the Honorable Cheryl L. Pollak, United States Magistrate Judge to will monitor compliance with the terms of this order for a period of three years from this date. Magistrate Judge Pollak shall have the power to compel compliance with the requirements of this judgment, and to recommend penalties and sanctions in the event of noncompliance.

Conclusion

For the foregoing reasons, this Court has found in favor of the plaintiffs. The Clerk of the Court is directed that this order closes this case.

SO ORDERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the day of two thousand three.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKENCHNIE
CLERK

HENRIETTA D.,

Appellees,

-against-

RUDOLPH GIULIANI,

Appellants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Rudolph Giuliani, Marva Hammons and Mary E. Glass, Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing **IS DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judgment that hears the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKENCHNIE, Clerk